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TAGORE LAW LECTURES.....1903.

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THE LAW OF ULTRA VIRES

IN

BRITISH INDIA.

BY

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PREFATORY NOTE.

THE publication of the lectures contained in this volume, twenty years after their delivery, requires a word of explanation. On the 29th July, 1902, the Faculty of Law recommended to the Senate that Mr. Satyaranjan Das, M.A., (Cantab.), Barrister-at-Law, be elected Tagore Professor of Law for the year 1902-1903, and that the subject of his lectures be the Law of *Ultra Vires*. The resolution of the Faculty was confirmed by the Senate on the 23rd August, 1902. Mr. Das who had, along with his application, submitted a printed copy of the Introductory Lecture and full synopses of the other lectures, delivered them in due course after his appointment to the Chair. But he was unable, by reason of failing health, to arrange for their publication, although he took time from the Syndicate on more than one occasion for the purpose. After his death, which took place on the 8th September, 1908, the manuscript of only two of the concluding Chapters could be discovered, although it was certain that the earlier Chapters also had been completed. In these circumstances, the only course left open was to reconstruct the lectures on the basis of the materials available, specially the full syllabuses which contained references to the leading decisions and furnished a clue to the method of treatment planned by the author. Mr. P. K. Chakrabarti, M.A., (Cantab.), Barrister-at-Law, composed Lectures II,

III, IV, V, VI, VII, VIII in their entirety as also the first part of Lecture IX. Lectures X and XI were composed by Mr. N. N. Gupta, M.A. (Oxon.), Barrister-at-Law. Mr. M. Krishnamachariar, M.A., M.L., Ph.D. of the Madras Judicial Service, has, with his large experience of editorial work, put the materials together and has added a useful addendum which refers to recent relevant decisions and statutes of importance. Mr. Bijan Kumar Mookerjee, M.A., M.L., and Mr. Rupendra Kumar Mitra, M.Sc., M.L., two of the Professors of the University Law College, have seen the work through the Press. Mr. S. R. Das, now Advocate-General of Bengal, had intended at one stage to give the work of his late brother the benefit of his experience. This, however, has been found impracticable; at the same time, it must be gratefully acknowledged that, but for his assistance and guidance the publication of the work would have been impossible. For such lack of uniformity as may be found in this volume, the generous reader will no doubt make due allowance. The subject is of great importance, and it was felt desirable that the work of the talented author, who was cut off in the prime of life, should not be lost to the University.

The 14th January, 1924.

A. M.

CONTENTS.

LECTURE.	PAGE.
I. Introduction	43
II. The General Nature, Import and Principles of the Doctrine	88
III. The Government of India	115
IV. The Local Governments and the Local Legislative Councils	148
V. High Courts	170
VI. Corporations	211
VII. Municipalities	261
VIII. Local Boards	270
IX. Board of Revenue	287
X. Companies	315
XI. Companies (contd.)	317
XII. Quasi-Corporations	355
Addenda	

LIST OF STATUTES.

	PAGE
20 Edw. IV fol. 2 pl. 7	342
21 Hen. VII, 16	343
9 Geo. I, C. 7	342
24 Geo. III, C. 25	282
26 Geo. III, C. 57	161
33 Geo. III, C. 152	161
37 Geo. III, C. 142	162
39, 40 Geo. III	161
53 Geo. III, C. 155	109, 130
59 Geo. III, C. 12	342
3 Will. IV	163
3 & 4 Will. IV, C. 85	69
4 & 5 Will. IV, C. 94	24
5 & 6 Will. IV, C. 69	342
1 Vic. C. 73	176
5 & 6 Vic. C. 57	312
7 & 8 Vic. C. 57	347
" C. 110	200
16 & 17 Vic. C	81
" C. 40	394
17 & 18 Vic. C 20	394
18 & 19 Vic. C 63	343
19 & 20 Vic. C 122	394
21 & 22 Vic. C 83	394
" C. 137	399
" C. 138	394
" C. 89	108
22 & 23 Vic. C.	89
" C. 102	394
23 & 24 Vic. C. 44	394
" C. 49	394

	PAGE
24 & 25 Vic. C. 67 ...	99
" C. 104 ...	43, 134, 162
27 & 28 Vic. C. 157 ...	391
28 & 29 Vic. C. ...	94, 95
33 & 34 Vic. C. 3 ...	120
37 & 38 Vic. C. 102 ...	394
42 & 43 Vic. C. 41 ...	321
" C. 43 ..	394
" C. 206 ...	394
43 Vic. C. 10 ...	394
44 & 45 Vic. C. 53 ...	394
47 & 48 Vic. C. 38 ...	99
48 & 49 Vic. C. 25 ...	394
51 & 52 Vic. C. 8 ...	394
55 & 56 Vic. C. 10 ..	394
58 & 59 Vic. C. 20 ..	394
9 Edw. VII C. 35 ...	361
1 & 2 Geo. V C. 18 ...	368
5 & 6 Geo. V C. 61 ...	361
6 & 7 Geo. V C. 37 ...	361
7 & 8 Geo. V C. 51 ...	408
9 & 10 Geo. V C. 101 ...	361

LIST OF ACTS AND REGULATIONS.

	PAGE.
Reg. I of 1780	281
Reg. II of 1793	4, 182
Reg. I of 1803	284
Reg. V of 1812	286
Reg. VII of 1817	286
Reg. III of 1818	101
Reg. VII of 1822	286
Reg. III of 1822	282, 285
Reg. II of 1819	286
Reg. IV of 1824	285
Act XLIV of 1853	283
Act II of 1857	346
Act XIX of 1857	25
Act XXII of 1857	346
Act XXVIII of 1857	346
Act XI of 1859	141
Act XIV of 1860	140
Act XXI of 1860	40, 352—354
Act IV of 1861	94, 102, 354
Act III of 1864	10, 25
Act X of 1866	4, 5, 25
Act VII of 1867	143
Act XX of 1863	286
Act III of 1871	137
Act XXIII of 1871	382
Act III 1872	281
Act XIV of 1874	144
Act XXI of 1874	282
Act XI of 1876	206, 324—340
Act I of 1877	299
Act IV of 1878	251

	PAGE.
Act I of 1880	354
Act VI of 1882	87, 252—312
Act XV of 1882	6
Act XIX of 1882	346
Act II of 1884	227
Act IV of 1887	399
Act XVIII of 1887	346
Act XII of 1895	26
Act X of 1897	3
Act VI of 1901	350, 368
Act VII of 1902	283
Act VIII of 1904	346
Act X of 1904	355—67
Act IV of 1905	283
Act VII of 1905	283
Act V of 1908	369
Act XXX of 1910	383
Act II of 1912	401
Act V of 1912	382
Act VI of 1912	383
Act II of 1913	408
Act III of 1913	408
Act IV of 1913	373
Act VII of 1913	383
Act X of 1914	383
Act XI of 1914	383
Act II of 1915	373
Act X of 1915	373
Act XI of 1915	383
Act XVI of 1915	400
Act III of 1917	408
Act XV of 1920	407
Act XLII of 1920	383
Act XLVII of 1920	383—393
Act IX of 1921	383

LIST OF ACTS AND REGULATIONS.

xi

	PAGE.
Act III of 1922 ...	400
Act XVI of 1917 ...	400
Act XVIII of 1920 ...	400
Act VIII of 1922 ...	400
Act XL of 1920 ...	400
Act VII of 1921 ...	400
Act XII of 1823 ...	400
Assam Act I of 1915 ...	379
Bengal Act XI of 1859 ...	200
III of 1864 ...	226
VII of 1864 ...	286
VIII of 1865 ...	286
II of 1872 ...	136
V of 1875 ...	286
III of 1876 ...	286
VII of 1876... ..	286
VIII of 1876 ...	286
VII of 1878 ...	145, 286
I of 1879 ...	286
IX of 1879 ...	280
VII of 1880... ..	286
IX of 1880... ..	286
V of 1881 ...	107
II of 1882 ...	136
III of 1884 ...	213—253, 376, 377
III of 1885 ...	263
IV of 1889 ...	407
III of 1890 ...	344
II of 1894 ...	286
V of 1908 ...	376
V of 1911 ...	406
III of 1913 ...	351
VI of 1914 ...	367
IV of 1920 ...	406
Bengal Reg. XIX of 1870 ...	286

	Page.
Bengal Reg. VII of 1822	389
Burma Act I of 1915	401
„ IX of 1920	400
„ IV of 1921	379
Bihar & Orissa Act I of 1913	381
„ II of 1916	401
Bom. Act XXVI of 1880	266
„ VIII of 1865	261
„ VI of 1873	237
„ V of 1879	382
„ I of 1884	263
„ VI of 1886	341
„ III of 1888	374-75
„ IV of 1890	300
„ IV of 1898	406
„ III of 1901	575
„ II of 1916	407
„ X of 1918	406
„ IX of 1920	407
C. P. Act I of 1916	407
„ IV of 1920	379
Punj. Act II of 1916	401
U. P. Act III of 1899	286
„ III of 1901	283
„ III of 1906	379
„ II of 1916	371
„ III of 1917	407
Madras Act XII of 1857	286
„ II of 1864	286
„ IV of 1865	132
„ VII of 1865	286
„ VI of 1867	286
„ IV of 1884	371
„ V of 1884	266
„ I of 1894	284

LIST OF ACTS AND REGULATIONS.

xiii

	PAGE.
Madras Act II of 1894 ...	286
" III of 1895 ...	286
" III of 1896 ...	286
" I of 1902 ...	286
" II of 1904 ...	286
" III of 1905 ...	286
" IV of 1914 ...	407
" IV of 1919 ...	374
" V of 1920 ...	374, 378, 379
" XIV of 1920 ...	408
" XV of 1920 ...	407
Madras Reg VII of 1817 ...	286

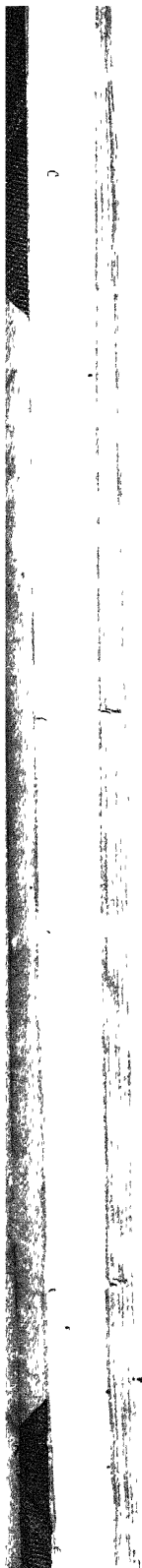


TABLE OF CASES.

A.

	PAGE.
Abaji Sitaram v. Trimbak Municipality	70, 232
Abdulla Hussain v. Administrator-General	357
Aboo Sait v. Arnott	132
Aboo Sait v. Dale	132
Ahmedabad Municipality v. Manilal Udenath	250
Ahmedabad Municipality v. Sybmanji	70, 232
Allen v. Gold Reefs of West Africa Ltd.	392
Alexander v. Simpson	189
Alter Kaufman v. Government of Bombay	98, 102
Amalgamated Society of Ry. Servants v. Osborne	178
Anandji Visram v. The Nariad Spinning and Weaving Company, Ltd.	40
Ashbury & Co. v. Riche 1, 19, 29, 30, 32, 37, 40, 81, 289, 307	
Att.-Genl. v. Andrews	341
Att.-Genl. v. Aspinall	230
Att.-Genl. v. Corporation of Liecester	174
Att.-Genl. v. Corporation of Newcastle	174
Att.-Genl. v. East Barnett Valley Urban Dt. Council	355
Att.-Genl. v. Great Eastern Ry. Co.	13, 37, 102
Att.-Genl. v. Great Northern Railway Company	16, 31, 32
Att.-Genl. v. Great Eastern Ry. Co.	31, 86
Att.-Genl. v. Kerr	174
Att.-Genl. v. London County Council	193
Att.-Genl. v. Merthyr Tydvil Union	380
Att.-Genl. v. Mayor of Poole	230
Att.-Genl. v. Ruper	342
Att.-Genl. v. Stewart	41
Ayers v. South Australian Banking Co.	197

B.

B. B. Trading Corporation v. Dorabji	291
B. N. Railway Co. v. Ramprotab Ganasham Doss	397
Bagshaw v. Buxton Local Board of Health	251

	PAGE.
Bagshaw v. The Eastern Union Railway Company ...	15
Baijnath Sahu v. Lal Sital Prasad ...	141
Baijnath v. Rajamjat ...	358
Bailey v. Foster ...	342
Bailiffs of Ipswich v. Johnston ...	179
Balfour v. Ernest ...	33
Balia Koer v. Bandh Ram ...	373
Balwant Ramchandra v. Secretary of State ...	368
Bank of Peshawar, Ltd. v. Madhoram ...	387
Bargate v. Shortridge ...	60, 75, 88
Baroness Wenlock v. River Dee Co. ...	30, 208
Bathyan v. Bouch ...	71
Bell v. Municipal Commissioners for Madras ...	106, 135
Beman v. Kufford ...	10
Bennett v. National Amalgamated Society & Co. ...	3, 40, 405
Bentham v. Hoyle ...	180
Bigger Staff v. Rowatt's Wharf Limited ...	50
Bissell v. Michigan Southern &c. Railway Companies ...	91
Black v. Williams ...	71
Bluett v. Stutchburys Ltd. ...	391
Blundell v. Winsor ...	22
Boschoek Proprietary, Co. v. Fuke ...	80
Bostock v. North Staffordshire Ry. Co. ...	315
Bray Smith v. Smith ...	375
British Insulated Wire Company Ltd. v. The Prescott Urban Council ...	100, 212
British Mutual Banking Co. v. Chainwood Forest Railway Co. ...	20
Brindabunchandla v. Karunanidhan ...	359
Brindaban v. Chairman, Srirampore Municipality ...	358
Broughton v. Mercer ...	41
Budho v. Keso and another ...	146
Burgess v. Northwich Local Board ...	224
Byramjee v. B. B. & C. I. Ry. Co. ...	397
C.	
Caledonian Railway v. Shenl & Co. ...	399
Calcutta Jute Mills Co. v. Nicholson ...	180
Calder & Hebble Navigation Co. v. Pilling ...	257
Caldow v. Pixell ...	71
Carron Iron Co. v. Maclaren ...	180
Chabildas Lalubhai v. Municipal Commissioner of Bombay ...	218
Chairman, Bijpur Municipality v. Nagendranath ...	328

TABLE OF CASES.

xvii

	PAGE.
Chairman, Gaya Municipality <i>v.</i> Sukan Singh ...	321
Chairman, Giridhi Municipality <i>v.</i> Sures Chandra ...	216, 244, 378
Chairman, Howrah Municipality <i>v.</i> Montanee Bewel ...	256
Chairman, Naihati Municipality <i>v.</i> Kisoril Lal Goswami ...	224
Chairman, South Barrackpur Municipality <i>v.</i> Amulya Nath Chatterjee ...	70, 232
Charter <i>v.</i> United Society of Boiler Makers ...	404, 405
Chidambaram <i>v.</i> Krishna Aiyenger ...	292, 384
Child <i>v.</i> Hudson's Bay Co ...	179
Chilton <i>v.</i> Corporation of London ...	186
Choonilal <i>v.</i> Spence's Hotel Co ...	290
Clayton <i>v.</i> Pierse ...	258
Cockerell <i>v.</i> Van Diemen's Land Co ...	72
Collector of Thana <i>v.</i> Bhaskar Mahadeb ...	131
Collector of Thana <i>v.</i> Dadabhai Bamanji ...	145
Colman <i>v.</i> Eastern Counties Railway Company ...	13, 16, 23, 26, 28, 31, 32, 194, 210
Conjeeveran Hodgsonpet Nidhi <i>v.</i> Kandasami ...	392
Conservators of River Tone <i>v.</i> Ash ...	341
Cooch <i>v.</i> Goodman ...	172, 179
Corporation of Calcutta <i>v.</i> Fudub ...	258
Corporation of Calcutta <i>v.</i> Jadav Dooly ...	256
Corporation of Calcutta <i>v.</i> Standard Marine Insurance Co. ...	243
Cortridge <i>v.</i> Griffiths ...	343
County of Gloucester Bank <i>v.</i> Rudry Merthyr Steam & Home Coal Colliery Co. ...	56
Coverdale <i>v.</i> Charlton ...	224, 225, 226
Cox <i>v.</i> Hutchinson ...	402
Cunliffe, Brooks & Co <i>v.</i> Blackburn etc. ...	207, 208, 209

D.

Damodhar Khan <i>v.</i> Deoram Khanji ...	106
D'Arcy <i>v.</i> Tamar ...	74
*Damodar Tukaram <i>v.</i> Secretary of State ...	364
Debnarain <i>v.</i> Chairman, Baruipur Municipality ...	378
Dedarnath <i>v.</i> Corporation of Calcutta ...	376
Desputty Singh <i>v.</i> Doolar Ray ...	168
Devaramani Bhogappa <i>v.</i> Pedda Bhimaka ...	382
Dixon <i>v.</i> Evans ...	289
Dominion Cotton Mills Co. Ltd. <i>v.</i> Amyot ...	386
Dowlatram Harji <i>v.</i> Vitho Radhoji ...	146
Duke of Bedford <i>v.</i> Dawson ...	248

	PAGE.
Dundappa Mallappa v Secretary of State	367
Dunlop Pneumatic Tyre Co. Ltd., v Action-Gos Gesellschaft für Motor and Motor-Fahrzeugbau	181
Dunn v. The Queen	111
Dutch West India Co. v. Jellies	181
Dutton v. Marsh	302
Dwarka Nath v Addya Sundari Mittra and others	236
Dyson v L & N W. Ry.	180

E.

E. I. Ry Co. v. Lala Moti Sagar	396
Eichbaum v. City of Chicago Grain Elevators	388
Earl of Shrewsbury v North Staffordshire Railway Co	46
Earnest v. Nicholls	200
East Anglian Railway Co. v Eastern Counties Railway Co	17, 28, 86, 210
East India Company v. Syed Ally	107
Eastern Counties Railway Company v Hawkes	18, 128
Ecclesiastical Commissioners v Meirall	85
Ellis v. Inveigarry	395
Elwood v. Bullock	180, 258
Emperor v. Balkishan	258
Emperor v. Dattatraya	360
Emperor v. Nadiishah	315
Emperor v Ritu	300
Emperor v. Nagindas	375
Empress v. Ishan Chandra De	145
Empress v. Nistar Raur	144
Ernest v. Nicholls	23, 34, 53
Evans v. Coventry	304
Ex-Raja of Coorg v. East India Company	107, 110
Exeter and Crediton Ry. Co. v. Buller	191

F.

Famatina Dev. Corpn. Ltd. v. Bury	388
Finchley Electric Light Company v Finchley Urban District Council	223, 224
Firm Sohanpal v. East India Railway	298
Flanagan v. G. W. Ry. Co	193
Folkstone Corporation v. Rook	381
Forster & others v. Secretary of State for India in Council	107
Foss v. Harbottle	55, 172

TABLE OF CASES.

xix

	PAGE
Foster v. Dodd	258
Foster v. London, Chatham, &c	193
Fountaine v. Carmarthen Railway Co	53
Frazerburgh Harbour Commrs. v. Will	400
Furnival v. Coombes	342
F. W. Duke v. Rameswar Malia	217, 250

G.

Gaekwar of Baroda v. Gandhi Kachrabhai	315
Galloway v. Mayor, etc. of London	251
Gandalal v. Eimp.	367
Ganga Narayan v. Municipal Board of Cawnpore	258
Ganpat Pataya v. Collector of Canara	106
Gental v. Rapps	257
G. E. Ry. Co. v. Turner	197
Gibson v. The East India Company	110
G. I. P. Ry. Co. v. Municipal Corporation Bombay	395, 396
G. N. W. C. Railway Co v. Charlebois	289
Goberdase Das v. Doolichand	403
Godhra Municipality v. Hiralal	375
Goorz & Co. v. Bell	180
Gosling v. Veley	191
Govardhan Singh and others v. Queen	136
Govardhandas Gokuldas v. Municipal Commissioner	374
Government v. Raj Kissen Singh	138, 142, 143
Govind Chandra Dutt v. Chairman of Howrah Municipality	73
Gouldsworth v. Knights	342
Graham v. Van Diemen's Land Co.	190
Gramophone etc, Ltd v Stanley	173
Grant v. Secretary of State for India	112
Grant v. United Kingdom Switchback Ry. Co.	58, 305
Gray v. Lewis	179
Gregory v. Patchett	104
Gujraj Sahai v Secretary of State	359
Guzeiat S. E. W. Co., Ltd. v Girdharial	300

H.

Hall v. Taylor	341
Hanson and another v Corporation of the Village of Grandmire	67
Harben v. Phillips	70
Harbour Trustees, Madras v. Best & Co.	344

	PAGE.
Hardwar Singh v. Kheda Ojha	144
Hari Lal v. B. N. Ry. Co.	397
Hari Pandurang v. Secretary of State	129, 133, 135, 141
Hartnal v. Rode Commissioners	341
Heerachand Bedreechand v. Elphinstone	107
Hemchand Devchand v. Azam Sakarlal Chhotamlal	106
Henriques v. Dutch West India Co.	181
Heyman v. European Central Railway Co.	81
Hill v. Manchester and Salford Water Works Company	33
Holmes v. Eastern Counties Ry. Co.	193
Homersham v. Wolverhampton W'Works	65
Hope v. International Financial Society	172, 188
Ho Tung v. Man on Insurance Co., Ltd.	76
Horn v. Henry Foulder & Co. Ld.	392
Howard v. Bodington	71
Hughes v. Sutherland	74

I.

Imperial Flour Mills Co., Ld. v. W. T. Lamb	300
Imperial Ice Manufacturing Co. Ld. v. Manchershaw	300
Irvine v. The Union Bank of Australia	33, 57, 58, 59, 84, 289, 307

J.

Jagatkishore Acharya Choudhury v. Dinanath Choudhury	166
Janson v. Duesfontein, &c., Mines	173
Jeffrys v. Gurr	112, 342
Jehangir v. Secretary of State	37, 111, 303
Jehangir Kastamji v. Sham Ladha	303
Johnson v. Lyttle's Iron Agency	40
Joti Pershad v. Crown	377
Jotiram v. Devba Ishvarappa	367
Julius v. Bishop of Oxford	72

K.

Kameswar Prosad v. Bhabua Municipality	244, 378
Kandasami v. Muthu Venkatachala	366
Kasandas Raghunathdas v. Ankleshvar Municipality	240, 360
Kathiawar Trading Co. v. Virchand Dipchand,	290, 390
Kernot v. Walton	291
Kerr v. Corporation of Preston	70
Kipling v. Todd	74

TABLE OF CASES.

xxi

	PAGE.
Kirsop v. Heighton	402
Kirk v. Bell	66
Kodak Ltd. v. Clark	173
Kruse v. Johnson	180, 258

L.

Laljibhai Shamji and others v. G. I. P. Railway Company ..	317
Lal Singh v. Ghansham Singh	1, 168
Leman v. Damodaraya	204, 236
Leominster Canal Co. v. Shrewsbury, etc. Railway Co. ...	65
Liverpool Borough Bank v. Turner	71
Lochaber Dist. Committee & Co. v. Invergarry and Fort Augustus Ry. Co.	325
London Financial Association v. Kelk	76
Lord H. Ulrick Browne v. Womesh Chandra Roy	252

M.

Macdonald v. Riddel	146
Macgregor v. The Official Manager of the Deal and Dover Railway Company...	18
Macintyre v. Conneil	22
Madurai Pillay v. Muther Chetty	372
Mahamed Sarwar v. Secretary, Camp. Municipality, Amrohi ...	376
Mahamed Abdul Hai v. Gujraj Sahai	359
Mahomed Amir v. Nachiappa	364
Mahomed Kasim v. Emp.	368
Mahiuddin v. Pirthichand	358
Mahony v. East Holyford Mining Co.	53, 56
Manéssur Das v. Municipality of Chapra	240, 378
Marsh v. Findlay	180
Martin v. Nutkin	342
Masonic, &c., Assurance Co. v. Sharpe	298
McMasters v. Reed	73
Mayor of Lyons v. East India Company	41
Mayor, etc., of Westminster v. L. & N. W. Ry. Co. ...	218, 248
Meares v. R.	94
Merchants of the Staple of England Co. v. Bank of England ..	190
Mersey Docks and Harbour Board v. Gibbs	341, 360
Miners Ditch Co. v. Zellerbach	48
Mitford v. Reynolds	41
Modhu Sundan Kundu v. Promoda Nath Ray	224
Mohesh Chandra Dass v. Jamiruddin Mollah	2

	PAGE.
Molla Ataul Haq <i>v.</i> Chairman, Manicktolla Municipality ...	367
Moment <i>v.</i> Secretary of State ...	364
Montreal and St. Lawrence Light and Power Company <i>v.</i> Robert ...	62
Mothoornohun <i>v.</i> The Bank of Bengal ...	296
Moodalay <i>v.</i> The East India Company ...	110
Moran <i>v.</i> The Chairman of Motihary Municipality ...	246
Morar <i>v.</i> Borsad Municipality ...	240
Mosely <i>v.</i> Koffiyontein Mines, Ltd. ...	385
Mozley <i>v.</i> Alston ...	172
Mubarak Shah <i>v.</i> Toofany ...	224
Municipality of Bombay <i>v.</i> Sunderjee ...	256
Municipal Commissioners for the City of Madras <i>v.</i> Parthasarathi ...	250
Municipal Committee, Malkapore <i>v.</i> Amroti Waman Dayal ...	317
Munt <i>v.</i> The Shrewsbury and Chester Railway Company ..	15
Municipal Mutual Insurance Ltd. <i>v.</i> Pontefract Corporation ...	379
Municipality of Sholapur <i>v.</i> Sholapur Spg. & Wg. Co. ..	236
Murray <i>v.</i> Bush ...	60

N.

Nabob of Carnatic <i>v.</i> The East India Company ...	107
Nafar Sheik <i>v.</i> Emp. ...	373
Nagar Valab Narsi <i>v.</i> Municipality of Dhandhuka ..	225, 250
Nando Lal Bose <i>v.</i> Corporation of Calcutta ..	213
Narayan Chandra <i>v.</i> Corporation of Calcutta ...	377
Narendranath <i>v.</i> Stephenson ...	367
Navadwip Chandra Pal <i>v.</i> Purnanda Saha ...	244
Nelson <i>v.</i> James Nelson & Sons Ltd. ...	311
Newby <i>v.</i> Van Oppen, &c. ...	181
New Fleming, S. & W. (o. Ltd. <i>v.</i> Kessowji Naik ...	307
Nihal Chand <i>v.</i> Azmat Ali Khan ...	224
Nobin Chandra De <i>v.</i> Secretary of State for India ...	111
North-Eastern Railway Co. <i>v.</i> Stewart ...	87
Norton <i>v.</i> L. & N. W. Ry. Co. ...	315

O.

Ollivant <i>v.</i> Rahimtula Nur Mahomed ...	251
Oram <i>v.</i> Hutt ...	405
Oriental Bank Corpn. <i>v.</i> Baree Tea Co. Ltd. ...	301
Overseers of Putney <i>v.</i> L. & S. W. Ry Co. ...	105, 203

P.

P. & O. Company <i>v.</i> Secretary of State ...	111
Parker <i>v.</i> Mayor of Bournemouth ...	180

TABLE OF CASES.

xxiii

	PAGE.
Parkum Chupothi Annad v. Ambalathan Kandi	373
Parr v. Lancashire & Cheshire Mines Federation	31
Patel Ranachand Girdhar v. Ahmedabad Municipality	250
Pelar v. Road Block Gold Mines &c. Ltd	195
Peoples' Ins Co. v. Westcott	189
Performing Right Society v. London Theatre of Varieties, Ltd	403
Phosphate of Lime Co. v. Green	76, 82, 83
Pooroo Chunder Roy v. Kristo Chunder Singh	132
Premshunker Rughunathji v. Government of India	138
President, Taluk Board, Kundapur v. Lakshminarayana	379
Provincial Bank of India v. Rai Raja Tej Singh	390
Puranchandra v. Dinabandhu	359

Q.

Q. E. v. Yusuf Khan	257
Q. E. v. Thakurdas	376
Qameruddin v. Jawahir	481
Quinton v. Corporation of Bristol	251

R.

R. v. Aloo Paroo	98
R. v. Brojo Nath De	226
R. v. Buah	90, 93
R. v. Elmstone	99
R. v. Kalidas Keval	260
R. v. Kastya Rama	99
R. v. Keepers, &c., of County of London	224
R. v. Mukunda Chandra	247
R. v. Reay	130, 131
R. v. Spencer	180
R. v. Yenku Bopuji	258, 260
Radhakishan Das v. The Municipal Board of Benares	70, 73, 231
Rajah of Ramnad v. Sitaram Chetty	373
Rajam Chetti v. Seshayya	7, 167
Raja Sahib Ram v. Secretary of State in Council	107
Ramaswami Chetty v. Municipal Council of Tanjore	70, 73, 232
Ram Govind Roy v. Syad Kushufudoza	141
Ram Krishna Pillay v. Muthu Perumal	373
Ramchand v. Diamond Jubilee Flour Mills Co. Ltd.	391, 392
Ramdas Hazra v. Secretary of State	112
Ram Narain v. Ram Kishen	389

	PAGE.
Rasul Khan v. Secretary of State	383
Reg. v. Poor Law Comm'rs.	342
Regulation Collector of Kalahasti v. Ramasami	368
Repton School Governors v. Repton Rural Council	380
Rex. v. Pettet	342
Rex. v. Austrey	342
Rex. v. Beeston	342
Rex. v. Mayor, &c., of London	21
Riche v. Ashbury Ry. Co.	177
Ridley v. Plymouth & Stonehouse Guilding and Baking Co.	35
Robinson v. Lewis	342
Ross. v. Secretary of State	368
Royal British Bank v. Turquand	34, 56, 58.
Ruben v. Great Fingall Consolidated, &c.	56

S.

Sakets Harbor Bank v. Lewis Company Bank	198
Samaldas Bechhai Desai v. The Secretary of State in Council	143
Sarat Chandra Das v. Secretary of State	112
Sarkies v. Prosonnomoyee Dassee	41
Sastri Ram Chandra v. The Ahmedabad Municipality ..	229, 230
Saunders v. S. E. Ry.	180
Scott v. Colburn	73
Scott v. Pilliner	180, 258
Secretary of State v. Hughes	360
Secretary of State for India v. Moment	95, 369
Secretary of State v. Bombay Landing & Shipping Company	106
Secretary of State v. Kamachee Boye Saheb	107
Secretary of State for India v. Matthurabhai ..	106
Secretary of State for India in Council v. Nriya Gopal Audhicary	44, 136
Sethu v. Venkatarama	145
Sevakram v. The Dakor Town Municipality	236
Shamnuggur Jute Factory Co. Ltd. v. Ramnath Chatterjee	37, 86, 289
Shaw v. Port Phillip Gold Mining Company ..	56
Shillito v. Thomson	180
Shivabhajan v. Secretary of State for India	111
Shrewsbury, etc. Ry. Co. v. Stour Valley Ry. Co.	193
Slattery v. Naylor	258
Small v. Smith	86, 193
Smallcombe v. Evans	189

TABLE OF CASES.

XXV

	PAGE
Smith v Hull Glass Co.	53
Smith v. Scottish Typographical Assn.	466
Society of Practical Knowledge v. Abbott	191, 200
Solomon v. Solomon	17
Solomons v. Laing	14
Sorabji v. Ishwardas	203, 307
South Wales Ry. Co. v. Redmond	191
Spackman v. Evans	30, 78, 308
Srinivasa v. Ramasabhapati	374
Stephens v Mysore Reefs, &c., Ltd	195, 290
Steward v. Dunn	173
Stone v. Liverpool Marine Society	402
Strass v. Eagle Ins. Co.	199
Sub-Collector of Colaba v. Gonesh Moressshvar Mehendale	143
Subbarao v. Ramarao	362
Sundaram Aiyar v. The Madura Municipal Council	225, 248
Sutton Harbour Imp. Co v. Foster	293

T.

Tajahmad v. University of Lahore	401
Taylor v. Chichester & Midhurst Ry. Co.	45, 68
Taluka of Kotda Sangani v. The State of Gondal	167
Toronto Municipal Corp. v. Virgo	257
Towers v. African Tug Company	50, 23, 290
Trevor v. Whitworth	81
Tribhovan v. Ahmadabad Municipality	256
Tromson v. Official Liquidator, Punjab Bank	303
Tuffnell v. Constable	341
Turquand v. Marshall	109
Tuticoin Municipality v. South Indian Railway	212

V.

Vaman Tatyaji v. Municipality of Sholapur	230
Vestry of St. Mary Newington v. Jacobs	221
Vijaya Raghava v. Secretary of State in Council	137, 19
Voss v. Secretary of State for India	112

W.

Wali Ram v. Bhagwan	118, 125
Waliya v. Nazari	185
Wandsworth Board of Works v United Telephone Co.	211

	PAGE.
Wasdeo v. Rupchand	441
Wasi v. Poonit	425
Wazir v. Lulit	393
Wazir Baksh v. Hari Ram	397
Wenlock v. River Dee	177, 289
White v. Morley	258
Whittaker v. Bamford	389
Wilkinson v. City of Glasgow Friendly Society	402
William v. Smith	475
Wise v. Raj Narain	438
Wilson v. Great Western Ry. Co.	395
Wilson v. Macanloffe	390
Withnell v. Gartham	342
Witley v. Joseph Stocks & Co. Ltd.	385
Wolstenholme v. Amalgamated Musicians' Union	406
Worthington v. Grimsditch	472

Y.

Yakub Ali v. Durga Prasad	481
Yarmouth Corporation v. Cowper	170
Ylazorath Kibulav v. Sunni Lal	421
York Tramway Co. v. Willow	384
Young v. Brownlee & Co.	391
Young & Co v. The Mayor of Royal Limington	68, 73, 232
Yusuf v. Sirdar	371, 437

LECTURE I.

INTRODUCTION.

The subject on which I am about to address you, is the law as regards *ultra vires*. The doctrine of *ultra vires* is the same in this country as in England.

The meaning of the term *ultra vires* is simply "beyond (their) powers." In a popular sense, these words include all exercise of power beyond the competency of the person exercising that power. Strictly speaking it has to be differentiated from want of jurisdiction or illegality. We hear, however, even Judges applying the term to acts done without jurisdiction (a), or to acts of illegality (b). I have no doubt that originally these words were used to express every exercise of power which was not warranted by the authority under which the person was purporting to act. But the phrase *ultra vires* has now acquired a definite legal significance. To understand this, we must first distinguish it from the expressions "want of jurisdiction" and "illegality."

Jurisdiction has been defined to be a power conferred by the State on a Magistrate or Judge to take cognisance of and determine questions

Meaning of the term *ultra vires*.

Not the same as "want of jurisdiction" or "illegality."

Definition of "jurisdiction."

(a) See *Lal Singh v. Ghansham Singh*, I. L. R. 9 All. 625.

(b) See *Ashbury Railway Carriage & Iron Company v. Riche*, L. R. 7 H. L. 653.

according to law, and to carry his sentence into execution. From jurisdiction in general must be distinguished the competency of a tribunal. By that phrase is meant the right which a tribunal has to exercise in a particular case the jurisdiction which belongs to it. The importance of the distinction arises from the fact that a plea of incompetency can be waived by consent of parties, whereas such consent can never confer jurisdiction where none exists (c).

What it
connotes.

From the above definition of the term jurisdiction we see that although it is a *power* conferred by the State, it connotes three things:—

- (1) The power to take cognisance of a question.
- (2) The power to determine the question at issue, after taking cognisance.
- (3) The power to carry out that determination or decision, by executing the decree or sentence.

Defined by
the High
Court of
Bengal.

In the case of *Mohesh Chandra Dass v. Jamiruddin Mollah* (d), the High Court of Bengal considered the meaning of the word "jurisdiction" with reference to section 578 (now section 99) of the Code of Civil Procedure (e).

(c) See Digest 5, 1, 1, 2 pr., § 1; 2, 1, 15. The word jurisdiction is used in English law to denote both the authority of a Court or Judge, and the territorial limits within which it is exercisable.

(d) I. L. R. 28 Cal. 324 (329).

(e) "No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any

Banerjee J. said: "That word (meaning jurisdiction) is used in two different senses. It may either mean what is ordinarily understood by the term jurisdiction when used with reference to the local jurisdiction of a Court, or its jurisdiction with reference to the subject-matter of a suit, or it may mean the legal authority of a Court to do certain things."

It is often in the sense of a want of "legal authority of a Court to do certain things," that the term *ultra vires* is incorrectly used. But, we never find the phrase "want of jurisdiction" used to signify the exercise of a power, say, by a joint-stock company which they do not possess. In fact, the word jurisdiction is limited to the exercise of a power connected with litigation, and is exclusively confined to the powers of a Court of Law, be it civil, or be it criminal. We can thus draw a broad distinction between the terms "without jurisdiction" and *ultra vires*. All acts beyond the powers of a Court of Law, when adjudicating between litigants, are known as acts done without jurisdiction. All acts done by persons (f), exercising statutory or other powers, beyond the powers possessed by them are

Confusion between the terms *ultra vires* and "want of jurisdiction."

The word "jurisdiction" is entirely confined to Court of Law when adjudicating between litigants—otherwise when framing rules.

error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court."

(f) "Person shall include any company or association or body of individuals whether incorporated or not." General Clauses Act (X of 1897) sec. 3, sub-sec. 39.

known as *ultra vires*. The words "when adjudicating between litigants" are a very necessary limitation to the definition of the phrase "without jurisdiction." Our Courts of Law, specially the High Courts, have various powers delegated to them by the legislature, besides the power to adjudicate, between litigants. For instance, under certain legislative enactments, the High Courts are given the power to make rules, consistent with such Acts, to carry out certain provisions of those Acts. In exercising those powers, the High Courts do not act in their judicial capacity, and if they frame a rule which they are not empowered to frame, the rule will be one made *ultra vires*. The phrase "without jurisdiction" would be, strictly speaking, inapplicable to such a case. Thus, where under the powers given by the Indian Companies Act, (X of 1866, § 189) (g), the High Court of Bombay framed the following rule: "Any creditor, whose debt or claim so allowed does not carry interest, shall be entitled to interest at the rate of six per centum per annum, from the date of the order to wind up the company, out of any assets which may remain after satisfying

*In re New
Fleming & Co.
Co., Ltd.*

(g) The High Court may make such rules concerning the mode of proceeding to be had for winding up a Company in such Court and in the Courts subordinate thereto, as may from time to time seem necessary and as may be consistent with the other provisions of this Act and with the Code of Civil Procedure.

the costs of the winding up, the debts and claims established, and the interest of such debts or claims as by law carry interest," it was held that under a power to make rules concerning the mode of proceeding in winding up, there is no authority given to make a rule which allows interest, not otherwise given by law, this being a matter of right, not a mode of proceeding^(h). The rule was held to be *ultra vires* of the High Court and consequently a nullity. Now, section 189 of the Indian Companies Act, (X of 1866), agrees substantially with section 170 of the English Companies Act, 1862, (25 & 26 Vict., c. 89), and the Judges of the Court of Chancery in England, framed an identical rule as regards interest. In fact, the Bombay High Court rule was a *verbatim* reproduction of the Chancery rule, with the exception of the rate of interest. The rule of the Court of Chancery was held by Lord Westbury in *The Hatfield Cask Company* ⁽ⁱ⁾, by Lord Romilly in *The Herefordshire Banking Company* ^(j), and by Lord Cairns in *The East of England Banking Company* ^(k), to be *ultra vires* and as not warranted by the statutes.

^(h) *In re New Fleming Spinning and Weaving Company Limited*, I. L. R. 3 Bom. 439 (450).

⁽ⁱ⁾ 9 Jur. N. S. 997.

^(j) L. R. 4 Eq. 250.

^(k) L. R. 4 Ch. 14.

*Rajam
Chetti v.
Seshayya.*

Again, by the Presidency Small Cause Courts Act (XV of 1882), section 33, the High Courts were given power to declare from time to time by rule what shall be deemed to be non-judicial and *quasi-judicial* acts within the meaning of that section. It was also enacted by the same section that "any non-judicial or *quasi-judicial* act which the Code of Civil Procedure as applied by this Act, requires to be done by a Judge.....may be done by the Registrar of the Small Causes Court...." By a rule passed by the High Court of Judicature at Madras, the High Court declared under this section that "granting leave to sue defendants out of the jurisdiction under section 18, clauses (a) and (c) of the Presidency Small Cause Courts Act, 1882"(l), was a non-judicial or *quasi-judicial* act within the meaning of section 33 which might be done by the Registrar of the Court of Small Causes, Madras(m).

(l) Section 18, clauses (a) and (c) are as follows:—

Subject to the exceptions in section 19, the Small Cause Court shall have jurisdiction.....

(a) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and *the leave of the Court* has, for reasons to be recorded by it in writing, been given before the institution of the suit; or

(c) any of the defendants, at the time of the institution of the suit actually and voluntarily resides, or carries on business, or personally works for gain, within such local limits, and either *the leave of the Court* has been given before the institution of the suit.....

(m) Fort St. George Gazette of 3rd December 1885.

It was held by the Full Bench of the Madras High Court, that the declaration and the rule of the High Court was *ultra vires*(n), Collins, C. J., holding that "under section 18 of the Act it is enacted that the leave of the Court must be given—the High Court by the rule has set aside that provision of law and has said that the leave of the Registrar is sufficient; it is impossible to say that a Registrar is a Court for such a purpose as this—the duties and powers of a Registrar are strictly defined and limited. It is also impossible to say that granting leave to sue a defendant out of the jurisdiction under section 18, clauses (a) and (c) was a non-judicial or a *quasi-judicial* act." Shephard, J., said: "It has to be seen whether this particular rule is a rule which it was competent to the High Court to pass either under the statute (24 & 25 Vict., c. 104, § 15) or under the Code. The power given in the former enactment is 'to make and issue general rules for regulating the practice and proceedings of such Courts'; in the latter enactment 'to make rules consistent with the Code to regulate any matter connected with the procedure of the Courts subject to its superintendence.' Now it is a recognised principle of law that the rules made in pursuance of a delegated authority to that effect must be

(n) *Rajam Chetti v. Seshayya*, I. L. R. 18 Mad. 236.

consistent with the statute under which they came to be made. The authority is given to the end that the provisions of the statute may be better carried into effect, and not with the view of neutralizing or contradicting those provisions. In the present case, there is a distinct provision of the Act requiring in certain cases that leave of the Court shall be given before the institution of a suit. Under clause (a) of the 18th section the leave of the Court for reasons recorded in writing has to be given. The effect of the rule is to dispense with the leave of the Court and substitute the leave of the Registrar. In my opinion, the rule is manifestly inconsistent with the section. It has the effect of neutralizing the section, not of carrying it into effect."

Here, the High Court of Madras had every right to declare what were non-judicial or *quasi-judicial* acts. But, in declaring them they went beyond their powers when they declared an act which the Act itself considered a judicial act to be a non-judicial or *quasi-judicial* act. Hence the rule or the declaration was *ultra vires* of the High Court.

What is
illegality.

"Illegality," in the largest sense of the word, no doubt includes what is *ultra vires*. What is beyond the powers of a person is illegal in the sense that everything is illegal that is not warranted by law. But, "illegal"

and *ultra vires* are phrases to which distinct meanings have, and very properly have been attached. "Illegal" in the strictest application of the word refers to that quality which makes the act itself one contrary to law. The term *ultra vires* has reference to the legal power of a person to do an act. An act may be legal and at the same time *ultra vires*. It is, therefore, important that the words "illegality" and *ultra vires* should each be used with due regard to its proper signification.

The distinction between the two has been very lucidly expressed in the judgment of the New York Court in the case of *Bissell v. Michigan Southern &c. Railway Companies*(o). "The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both these defects, but it may also have one without the other. For example, a Bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the Board of Directors, and under the corporate seal, for the building of a Church, or College, or an Alms-house, would be clearly *ultra vires*, but it would not be illegal. If every Corporator should expressly assent to such an application of the funds, it

Distinction
between
ultra vires
and illegality
drawn by
American
Courts.

(o) 22 N. Y. 258; quoted in Brice on the Doctrine of *Ultra Vires*, 3rd Edition, p. 44.

would still be *ultra vires*, but no wrong would be committed and no public interest violated. So, a manufacturing corporation may purchase ground for a school-house or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution among them. Such dealings are outside of the Charter ; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So, a Church Corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no State policy in restraint of that business."

By the
House of
Lords.

In *Ashbury Railway Carriage &c. Company v. Riche (p)*, Lord Cairns, L. C., draws the same distinction between the words " illegality" and *ultra vires*. He says, "I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression 'illegality.' In a case such as that which your Lordships have now to deal with, it is not a question whether the contract is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in

itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."

To make this more clear, we will take the instance of acts done or purported to be done, say, by a joint-stock company. Now, such acts may be void on several grounds which may be summarized as follows:—(1) Because they are contrary to public policy generally, as for instance, an agreement for compounding a felony; (2) because they may be forbidden by statute, as for instance, the holding of lotteries; (3) because they are contrary to the policy of the Companies Act, as for instance, the reduction of the capital of the company not carried out in accordance with the provisions of that Act; (4) they may be beyond the powers of the company. Of these the first three are illegal, and on that account void; but the last is void, not because illegal, but because, there being no power to do the act, the forms gone through which purported to perform it were inoperative, and the act, if done at all, was not done by the company, but by the person whose hand actually did it, and therefore neither brings the company under any liability nor gives it any right.

Examples of
acts illegal
and *ultra*
vires.

Application
of the word
illegality.

We thus see that the word illegality in its strictly legal sense is applicable only to those acts which are wrongful, without reference to the absence of legal power of the person doing them as distinguished from express prohibition. An act may be wrongful by reason of statutory prohibition or it may be wrongful by reason of its being opposed to public policy, or because it is tainted with fraud or crime, or because it is vitiated by duress or undue influence. These qualities have no reference to the absence of the legal power of the doer to do the act.

Essence of
the doctrine
of *ultra*
vires.

The phrase *ultra vires* is applicable only to acts done in excess of the legal powers of the doer, as distinguished from want of jurisdiction and illegality. This may be called the essence of the doctrine of *ultra vires*. It is action in excess of the powers possessed by a person (which includes a body corporate) within the above limitations. This presupposes that the powers are in their nature limited.

In cases of
individual
citizens,
what is not
forbidden is
permitted.
In cases of
corpora-
tions what-
ever is not
permitted is
forbidden.

What is the nature of that limitation? In speaking of an ordinary citizen, we do not speak of any action being *ultra vires*. To an ordinary citizen whatever is not expressly forbidden by the law is permitted by the law. It is only when the law has called into existence a person for a particular purpose or has recognised its existence—such as the holder of an office, a body corporate &c.—that the power

is limited to the authority delegated expressly or by implication and to the object for which it was created. In the case of such a creation the ordinary law applicable to an individual is somewhat reversed. Whatever is not permitted, expressly or by implication, by the constituting instrument, is prohibited, not by any express prohibition of the legislature(*q*), but by the doctrine of *ultra vires*. Thus, in the case of *Colman v. Eastern Counties Railway Company*(*r*), where Colman on behalf of himself and other share-holders of the Eastern Counties Railway Company brought a suit against the company and the directors, (because they, the directors, for the purpose of increasing the traffic, proposed to guarantee a 5 per cent. dividend to the shareholders of an intended steam-packet company, who were to act in connection with the railway), to restrain the company from guaranteeing any such dividend, Lord Langdale, M. R., in restraining the company from acting as they proposed to do, said: "I am clearly of opinion that the powers which are given by an Act of Parliament, like that now in question, extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the

Decisions of
the Courts
of Equity.

(*q*) *Attorney-General v. Great Eastern Ry. Co.*, L. R. 5 App. Cases 473.

(*r*) 10 Beav. 1 (14).

Act has expressly sanctioned. How far those powers which are necessarily or properly to be exercised for the purposes intended by the Act, extend, may very often be a subject of great difficulty. We cannot always ascertain what they are. Unless the acts done can be proved to be in conformity with the powers given by the special Acts of Parliament, under which those acts are done, they furnish no authority whatsoever." Again: "Do the powers to construct, maintain, regulate the traffic, and do all that is necessary for the purpose of carrying on and working the rail road, imply that the directors are to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and by being itself profitable, add to the profits of the railway company? Surely there is nothing in the powers given by this Act of Parliament which can authorize that. I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the Act of Parliament, and they have no power of doing anything beyond it."

In the case of *Salomons v. Laing*(s), where a Railway Company became lawfully possessed of shares in another Railway Company and they wanted to increase the number of their

shares in order to control the working of the other Railway Company, it was held by Lord Langdale, M. R., that a corporation incorporated by Act of Parliament was bound to apply all the monies and property of the Company for the purposes directed and provided for by the Act, and for no other purpose whatsoever.

In *Bagshaw v. The Eastern Union Railway Company*(*t*), a Railway Company, having power under several Acts of Parliament to make and purchase certain Branch Railways in connection with their main line, were, for those purposes respectively, authorized to raise the requisite capital by the creation of new stock. They were about to apply the funds so raised to the prosecution of works on their main line. Lord Cottenham, L. C., held that those who subscribed for the purposes specified by the Acts, had a right to have their monies applied to such purposes exclusively.

In *Munt v. The Shrewsbury and Chester Railway Company*(*u*), where the company proposed to employ part of their capital to prepare, prosecute and promote a bill in Parliament, most closely connected with the interests of the company, the application of any of their funds for purposes not authorized by their Act of incorporation was held to be

(*t*) 2 M'N and G, 389.

(*u*) 20 Law Journ: N. S. Chan. 169.

ultra vires. Lord Langdale re-affirmed the principle which he had laid down in *Colman v. The Eastern Counties Railway Company*(v), and held, "companies possessed of funds for objects which are distinctly defined by Act of Parliament, cannot be allowed to apply them to any other purpose whatsoever, however beneficial or advantageous it may appear either to the company or to individual members of the company."

In *Beman v. Rufford*(w), the directors having entered into a contract, the legality of which was doubtful, Lord Cranworth said: "I am clearly of opinion, on all the authorities, and all principle, that it is the province of this Court to prevent such an *illegal* contract from being carried into effect, because on the principle that has been so often laid down, this Court will not tolerate that parties shall lay out one farthing of their funds out of the way in which it was provided by the Legislature that they should be applied."

In *Attorney-General v. Great Northern Railway Company*(x), Kindersley, V. C., restrained the company from dealing in coal, holding that though an Act of Parliament constituting a Railway Company may contain no prohibition

(v) 10 Beav. 1.

(w) 15 Jurist 915.

(x) 1 Dr. and Sm. 154.

in express terms against the company's engaging in any business, there is in every such Act an implied contract to that effect. Even if the great body of shareholders agree to carry on a business different from that for which the company was constituted, a single shareholder has a right to say that it shall not be done.

The cases we have been discussing up to the present were all brought before the Court of Equity. They were all cases which dealt with the misapplication or intended misapplication of the corporate funds. But the doctrine has been acted on in Courts of Law (as distinguished from Courts of Equity), to the extent of holding that a contract even under the seal of a company, cannot in general be enforced, if its object is to cause the corporate property to be directed to purposes not within the scope of the Act of incorporation.

Courts of
Law.

Thus, in the case of *The East Anglian Railway Company v. The Eastern Counties Railway Company*(y), where the suit was on a contract under the seal of the defendant railway company to pay the expenses of the plaintiff company to promote certain bills in Parliament, the Chief Justice said: "The statute incorporating the defendant's company gives no authority, respecting the bills in

(y) 11 C. B. 775 (803).

Parliament promoted by the plaintiffs, and we are, therefore, bound to say that any contract relating to such bills is not justified by the Act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

This case was afterwards recognised and acted on by the Exchequer Chamber, in the case of *Macgregor v. The Official Manager of the Deal and Dover Railway Company* (z).

Summarized
by the
House of
Lords.

In *Eastern Counties Railway Company v. Hawkes*(a), the Lord Chancellor (Lord Cranworth) after reviewing all the cases decided by the Courts of both Equity and Law up to that time (1855) stated: "It must, therefore, be now considered as a well-settled doctrine that a company incorporated by Act of Parliament for a special purpose, cannot devote any part of its funds to objects unauthorized by the terms of its incorporation however desirable such application may appear to be."

Why the
doctrine is
applied.

Now, if we consider the above cases carefully, we find that the doctrine is applied because the Corporation or the Company, as the case may be, has its legal existence for a particular purpose only, and that purpose is a creation of the law either expressly or by implication.

(z) 22 L. J. Q. B. 69.

(a) 5 H. L. Cases 331.

Lord Selborne in *Ashbury, &c., Co. v. Riche(b)*, observed as follows : "I say that a statutory corporation created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purpose of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act, 1862, appear to me to be statutory corporations within this principle." Again: "I think contracts for objects and purposes foreign to, or inconsistent with, the Memorandum of Association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do."

Observations of Lord Selborne.

It is principally in connection with corporations and joint-stock companies that we find the development of the doctrine of *ultra vires*. It is advisable therefore to consider at this stage the origin and growth of these forms of association.

Development of the doctrine.

Corporations existed in ancient Rome and were known as *Gildæ* or *Universitatis*; and a

History of corporations.

large part of Roman law is concerned with the regulation of trading companies and guilds.

Roman
Law.

By the Roman law a corporation consisted of a number of individuals united by public authority in such a manner that they and their successors constituted but one person in law, with rights and liabilities distinct from those of its individual members. Cities, colleges, hospitals, scientific and trading associations, and societies for other public purposes could be so incorporated(c). They were generally authorised to make bye-laws for the administration of their own affairs, so far as they were not contrary to the law of the land or *their own special constitution*.

Common
Law.

Corporations were known to the Common Law of England from very ancient times. We will discuss the nature and different varieties of corporations later on. The right to create corporations is a part of the royal prerogative. The king's consent, either expressly or impliedly, is absolutely necessary to the creation of any corporation. The king's implied consent is to be found in corporations which exist by force of (1) The Common Law, (2) Prescription, (3) Implication. The methods by which the king's consent is expressly given are either (4) By Charter or Letters Patent of

(c) Digest I, 8, 6 § 1.

the Crown passed under the Great Seal or (5) By Act of Parliament. By Act of Parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created(*d*); but it is to be observed, that till of late years most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; or, they permit the king to erect a corporation *in futuro* with specified powers. So that the immediate creative act was usually performed by the king alone, by virtue of his royal prerogative(*e*).

A corporation always risked forfeiture of its Charter for abuse of its franchises. A corporation had a definite object and its capacity was limited; and if it presumed to act outside them, it endangered its very existence(*f*). This is but the germ of the doctrine of *ultra vires* which has been so greatly developed by recent decisions.

From corporations to joint-stock companies of the present time was not any easy step. The Common Law only knew of a corporation or a partnership formed for the

(*d*) 10 Rep. 29.

(*e*) Blackstone's Commentaries Book I., p. 472 (15th Ed.)

(*f*) "I am of opinion that a corporation may be forfeited, if the trust be broken and the end of the institution be perverted." *Per* Holt, C. J., in *Rex v. Mayor &c., of London*, 1 Show. 274 (280).

sake of sharing profits. It did not recognise companies which were neither corporations nor partnerships (g). The Courts treated as illegal any association for profit which attempted to arrogate to itself the privileges of a corporation(h). Joint-stock companies differed from corporations inasmuch as they did not obtain the sanction of the sovereign. They were created by the mere act and voluntary association of their members. They differed from partnerships inasmuch as the shares of a member could be transferred without the consent of the other members. There are other distinctions, but this is the principal difference. "Joint-stock companies have funds so extremely large and exercise powers so extensive and so materially affecting the rights and interests of other persons and the rights which the public or the subjects of Her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a Railway Company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of

(g) *Macintyre v. Connell*, 1 Sim. N. S. 233.

(h) *Blundell v. Winsor*, 8 Sim. 601.

all individuals in this realm"(i). Again, Lord Wensleydale in *Ernest v. Nicholls*(j), said: "It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock. The Legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities." But these companies soon began to force themselves upon the attention of the legislature and the judiciary.

It was only within the last century that joint-stock companies struggled into existence, and after much opposition were recognised and countenanced by the legislature. Every obstacle was placed in their way, and by the Bubble Act (k) it was attempted to put them down as nuisances. But, notwithstanding this statute, joint-stock companies increased both in number and importance. The Bubble Act was repealed in 1825. By the Act of 1825 (l), the Crown was empowered to grant charters of incorporation, and at the same time to declare that the persons so incorporated

Came into prominence at the beginning of last century. The Bubble Act.

(i) *Colman v. Eastern Counties Railway Company*, 10 Beav. 1 (1833).

(j) 6 H. L. Cases 401 (418).

(k) 6 Geo. I., c. 18.

(l) 6 Geo. IV., c. 91.

should be personally liable for the debts of the body corporate. At common law, the Crown, though it had the power to grant charters of incorporation by Letters Patent under the great seal, had no power to declare that the persons incorporated by them shall be personally liable like the members of a partnership. By 4 & 5 Will. IV c. 94 passed in 1834, the Crown was empowered to confer on a company, without incorporating it, the privilege of suing and being sued in the name of a public officer. In 1844^(m), a General Act was passed enabling all companies (with some exceptions) to obtain from an office in London a certificate of incorporation without applying either for a charter or for an Act of Parliament. But by this Act the principle of limited liability in its fullest sense was not recognised. All the members of every one of such companies were liable to the last farthing for its debts. The liability of members was limited to a certain extent only; *i.e.*, creditors could not proceed against them personally till they had satisfied the Courts that the company was not in a position to fulfil its obligations. It was only in the year 1855⁽ⁿ⁾, that an Act was passed enabling companies registered under the General Act of 1844 (other than Insurance Companies), to obtain a certificate of incor-

The Act of
1834.

The General
Act of
1844.

The principle
of
limited
liability re-
cognised
since 1855.

^(m) 7 & 8 Vict., c. 110.

⁽ⁿ⁾ 18 & 19 Vict., c. 133.

poration. Subsequently, in 1856 and 1857(*o*), almost all the previous statutes were repealed, and their most valuable provisions were consolidated, and extensive alterations of an entirely new character were introduced. The law was again codified in 1862. The doctrine of limited liability of persons associated together for the purpose of gain was for the first time fully recognised by this act(*p*), since which year companies have been governed by the Acts of Parliament which are now known as the Companies Acts, 1862 to 1900.

The Indian Companies Act of 1857(*q*), followed the English Acts of 1856 and 1857 in almost every particular. The English Acts having been repealed by the codifying Act of 1862, the Indian legislature followed suit by passing the Indian Companies Act, 1866(*r*). Between 1862 and 1882, several amending Acts were passed by the Imperial Legislature; so in 1882 (*s*) the Act of 1866 was repealed, and an Act was passed by the Indian Legislature embodying all the changes that had taken place in the meantime in the English Acts. The Companies (Memorandum of Association)

The Indian
Companies
Act.

(*o*) 19 & 20 Vict., c. 47; 20 & 21 Vict., c. 14.

(*p*) 25 & 26 Vict., c. 89.

(*q*) Act XIX of 1857.

(*r*) Act X of 1866.

(*s*) Act VI of 1882.

Act was passed in 1895(*t*), and this Act also resembles the English Act of the same name.

The growth
of the
doctrine.

We have now briefly glanced through the history of corporations and joint-stock companies. We will now proceed to consider how the doctrine came to be a part of the legal system of England and hence of India. The doctrine is of modern growth. The doctrine of *ultra vires* first began to take definite shape in cases upon acts done by railway and other companies formed under special Acts of Parliament. In fact, the decision, which first formulated the doctrine, was with reference to the *ultra vires* acts of a railway company(*u*). The great railway companies of England were being projected and developed about the first quarter of the last century. Almost immediately after these railway companies had been started, questions were raised as to the exact nature of the powers possessed by or granted to them. The very first case, in which the doctrine was prominently brought before the Courts and distinctly recognised as a guiding principle in the determination of questions relating to the powers possessed by companies, was *Colman v. Eastern Counties Railway Company*(*v*). We have already seen

The first
case in a
Court of
Equity:
Colman v.
Eastern
Counties
Railway
Company.

(*t*) Act XII of 1895

(*u*) In 1846.

(*v*) 10 Beav. 1.

how the case arose^(zv). Lord Langdale, M. R., said as follows: "I think it right to observe that companies of this kind possessing most extensive powers have so recently been introduced into this country, that neither the Legislature nor the Courts of Justice have been yet able to understand all the different lights in which their transactions ought properly to be viewed. We must, however, adhere to ancient general and settled principles, so far as they can be applied to great combinations and companies of this kind." Again: "We are to look upon those powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the General Acts, those powers must always be carefully looked to." In 1851, the Court of Common Pleas, following the decisions of the Courts of Equity, held that a railway company incorporated by Act of Parliament, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion

(zv) Ante. p. 13.

of its funds to purposes foreign to those for which it is incorporated(*x*).

Doctrine first arose in connection with railway companies.

From 1846 to 1855, *i.e.*, from the time of the decision of the case of *Colman v. Eastern Counties Railway Company*(*y*), to that of the case of *Eastern Counties Railway Company v. Hawkes*(*z*), most of the cases were connected with railways, and naturally so. When the doctrine first came into prominence the railway companies were the only large bodies of trading companies, having at their command very large capital and trying to engage in many speculations not authorized by their constituting instruments.

From railway companies to joint-stock companies.

From applying the doctrine to the railway and other companies incorporated by Acts of Parliament, to applying it to other joint-stock companies incorporated under the Companies Acts, was but a step, and the step was soon taken. We have seen that the Act of Parliament creating a company was looked upon as the instrument which limited the powers of the company. The Memorandum of Association of a company incorporated under the Companies Acts, was, as it were, the charter of such a company, and defined the limitation of the powers of a company to be established under

(*x*) *The East Anglian Railway Company v. The Eastern Counties Railway Company*, 11 C. B. 775.

(*y*) 10 Beav. 1.

(*z*) 5 H. L. Cases 331.

the Acts(a). Lord Selborne in delivering judgment in *Ashbury &c. Company v. Riche* (b) said: "The Memorandum of Association is under that Act (meaning the Companies Act, 1862) their fundamental, and (except in certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in that Memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the Memorandum, and make those conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void and *ultra vires* of the company, as well as beyond the powers delegated to its directors or administrators. I am unable to see any distinction for this purpose between statutory corporations under the Railway Acts, and statutory corporations under the Joint-Stock Companies Act of 1862."

The doctrine was called forth to prevent railway companies from acting beyond their powers. It was then by analogy applied to companies incorporated under the Companies Acts. From this, the next step was to apply the doctrine to all corporations created for a

From Joint-Stock Companies to all corporations created for a special purpose.

(a) *Per* Lord Cairns, L. C., In *Ashbury &c. Company v. Riche*, L. R., 7 H. L. 653 (668).

(b) L. R., 7 H. L. 653 (693).

particular purpose. This was done in the case of *Baroness Wenlock v. The River Dee Company* (c), where the House of Lords held that the law laid down by the *Ashbury &c. Company v. Riche* (d) applied to all corporations created for a particular purpose, and not only to companies created under the Companies Act, 1862.

Applied to
all bodies
having
powers
delegated to
them, or
created for
a particular
purpose.
Hence to
High
Courts
and to
subordinate
legisla-
tures.

The doctrine of *ultra vires* having originated in the best interests of trade and commerce, has been applied to all bodies having powers delegated to them by law either expressly or by implication. It is in this sense that rules framed by the Court of Chancery or by the High Courts have been held to be *ultra vires*, if they in framing such rules have gone beyond their powers (e). The powers of subordinate legislatures are also derived from the instruments creating them. And, if in framing any law they should violate any of the powers, so laid down, such law will be held *ultra vires* of the legislature and thus null and void. In each case the powers are limited to the nature of the Act creating them.

Judge-made
law.

From the history of the rise and progress of the doctrine of *ultra vires*, we see that it is another instance of judge-made law, that it is purely a creature of judicial decision. The

(c) L. R. 10 App. Cases, 354.

(d) L. R. 7 H. L. 653.

(e) Ante. p. 3—4.

legislature had not provided for it directly. We have seen that Lord Langdale in *Colman v. The Eastern Counties Railway Company* (ee) based his decision upon grounds of public policy and commercial necessity, to meet and provide for circumstances which called for the intervention of some strong hand. I cannot do better than quote the words of Kindersley, V. C., in *Attorney General v. Great Northern Railway Company* (f), as to the reason of the creation of the doctrine. "Now, why has the rule been established, that railway companies must not carry on any business other than that for which they were constituted. It is because these companies being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private trader out of the field, and create in their own favour a practical monopoly, whereby the interests of the public would be most seriously injured." Another object of the creation of the doctrine was to protect shareholders by preventing their companies from engaging in hazardous enterprises,

Upon grounds of public policy and commercial necessity.

And as a protection to shareholders.

(ee) 10 Beav. 1.

(f) 1 Dr. & Sm. 154 (1859).

Unanimous
consent of
share-
holders
does not
cure defect.

and thus dissipating the corporate funds(g). But the pith of the doctrine being "lack of power," even the unanimous consent of all the shareholders will not cure the defect. "I must, in the absence of any legal decision, say, that I consider that the acquiescence of all the shareholders in such transactions, afford no ground whatever for the presumption of their legality"(h). And herein, we may say, that corporations and joint-stock companies differ from partnerships. In a partnership, all the shareholders may combine together and engage in undertakings which were not contemplated by their deed of partnership. They may thus vary their constating instrument. But a joint-stock company except in certain particulars allowed by the Companies (Memorandum of Association) Act cannot do so(i).

The doctrine being once firmly established, its operation could not be controlled. Many consequences, undreamt of by the originators of the doctrine, followed in logical sequence. If all contracts made or purported to be made by a statutory person, beyond their powers were void, it followed that they could repudiate all such contracts. Thus, the well-known maxim of the Common Law that a man cannot

(g) *Attorney-General v. Great Northern Railway Company*, 1 Dr. & Sm. 154.

(h) *Colman v. The Eastern Counties Ry. Co.*, 10 Beav. 1.

(i) *Ashbury &c., Co. v. Riche*, L. R. 7 H. L. 653.

stultify himself was abrogated in favour of the doctrine; and, though, no individual will be allowed to plead want of authority in a suit on a contract entered into by him, a statutory person will always be allowed to take the defence that a contract is void because executed contrary to the provisions of its constituting instrument (1).

Some logical consequences of the doctrine.
(1) Repudiation of contracts.

Corporations or joint-stock companies are incapable of mental expression except through recognised agents. The directors of a company are the agents through which it acts. But is the company bound by all the acts of the Board of Directors? What, if, the Board exceeds its powers? An act may be *extra vires* of the directors but *intra vires* of the company. Such acts may be cured by subsequent ratification by the company. Thus, in the case of *Irvine v. The Union Bank of Australia*(k), their Lordships of the Privy Council held, that borrowing by the directors of a joint-stock company in excess of the authority given by the Articles of Association was *ultra vires* of the directors, but it could be cured by subsequent ratification by the company. But, if the directors enter into a contract which is *ultra vires* of the company, the Board will not then be recognised as the agents of the company; and the maxim,

(2) Repudiation of acts of agents.

Ratification.

(j) *Hill v. Manchester and Salford Water Works Company*, 2 B. & Ad. 544; *Balfour v. Ernest*, 5 C. B. (N. S.) 601.

(k) 2 App. 366.

Qui facit per alium facit per se, although the basis of the law of principal and agent, will have no application. Corporations can be bound either by their own proceedings, or by those of their agents, within certain limits. Their authority is limited and regulated by the deed of settlement under which the corporation is constituted. Therefore, they cannot be bound by the acts of those directors who go beyond the powers of the corporation itself.

Onus of
proving
authority.

It was formerly held that the onus of showing that the governing body had authority to enter into the contract was upon the party alleging such authority. And the reason for the rule was apparently this: In the case of joint-stock companies, the legislature has provided that all the world should have notice as to who were the persons authorised to bind all the shareholders, by requiring the co-partnership deed to be registered, and made accessible to all. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company, and the directors can make no contract so as to bind the whole body of shareholders, unless they are strictly complied with^(l). The case of *The Royal British Bank v. Tarquand* (m), lays down that everyone dealing with a corporation must be assumed to have knowledge of a deed of this description.

(l) *Ernest v. Nicolls*, 6 H. L. Cases 401.

(m) 5 E. & B. 248; 6 E. & B. 327.

The Court of Queen's Bench distinctly says that parties dealing with the directors of these joint-stock companies are bound to read the deed or statute limiting the directors' authority. Parke, B., in *Ridley v. Plymouth & Stonehouse Grinding and Baking Co.* (n), laying down the same doctrine observes: "The 7 & 8 Vict., c. 110, § 7 (o), provides that there shall be no complete registration of such a joint-stock company until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are, and any person may find in the deed the duties of the directors and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority."

The Courts of India have simply been following in the footsteps of the Courts of England. Though the decisions of the English Courts are not binding on our Courts, still they offer a very valuable guide, especially with regard to a doctrine which may be said to be a special creation of the English Courts.

Courts in
India follow
English
decisions.

(n) 2 Ex. 711.

(o) The Companies Act of 1844.

*In the
matter of
the Indian
Companies
Act, etc.*

Thus we find in *The matter of the Indian Companies Act, 1866, and of the Port Canning Land Investment &c. Company, Ltd. (p)*, Phear, J., laying down the law that if the directors of a joint-stock company engage in a business in which they cannot engage according to the plain meaning of the Memorandum of Association, whatever is done by the directors, as on behalf of the company, must be treated as having been done by them without authority, for their power, as agents of the company, did not extend thus far, and they could not acquire power to bind the company, *qua* company, from any conduct on the part of the shareholders. "An incorporated company has power to do everything which is not illegal or actually prohibited to it by the terms of its incorporation. This is true as regards the means of carrying into effect the purposes for which the company is incorporated. The principle does not apply outside that limit. The company is prohibited from engaging in undertakings which do not fall among the objects of its incorporation."

"The interests of the public on the one hand, and of the shareholders on the other, require that the directors shall be rendered powerless to use the strength and the means of the company, and to pledge its credit beyond the scope of them."

In the case of *Shamnuggur Jute Factory Co. Ltd. v. Ramnarain Chatterjee* (q), the Court composed of Wilson & Porter, JJ., said: "The general principles of law applicable to this question are authoritatively laid down by the House of Lords in *Ashbury &c. Co. v. Riche* (r), and *Attorney-General v. Great Eastern Railway Company* (s). For the present purpose we think the result may be sufficiently stated by saying that the powers of a company depend upon its Memorandum of Association or other instrument of incorporation, and it can do nothing which that document does not warrant expressly or impliedly. A company, therefore, formed to carry on one trade cannot engage in another. But, on the other hand, this doctrine must be reasonably understood and applied. And a company, in carrying on the trade for which it is constituted, and in 'whatever may be fairly regarded as incidental to, or consequential upon that trade,' is free to enter into any transaction not expressly prohibited." In *Jehangir R. Modi v. Shamji Ladha* (t), Sarjent, J., in delivering judgment said: "A long series of decisions of the Courts of Law and Equity in England had decided that an incorporated joint-stock company can do no

*Shamnuggur
Jute Factory
Co. v. Ram-
narain
Chatterjee.*

*Jehangir
Modi v.
Shamji
Ladha.*

(q) I. L. R., 14 Cal., 189.

(r) L. R., 7 H. L., 653.

(s) I. L. R., 5 App., Cases 473.

(t) 4 Bom. H. C. R., 185 (190—191.)

act which is not expressly authorised by the Act of Parliament under which it is incorporated, or the deed of settlement of the company. It is, therefore, to the Memorandum and Articles of Association that we must turn to determine whether those transactions are expressly or impliedly authorised; or as it has been sometimes expressed, whether they fall within the scope of the objects for which the company was established.....By the objects for which a company is established are of course meant the operations to be carried out after the company is formed, and cannot refer to acts which precede the formation of the company, and which must *ex necessitate rei* have been performed before the company can be said to have an object at all, or at least to be capable of realising one." And further on, his Lordship speaks of the Articles of Association as the contract of partnership between the shareholders.

Memorandum of Association and Articles of Association.

We notice in this case that his Lordship was inclined to place the same value on the Articles of Association as on the Memorandum of Association. The Articles of Association do not define the objects of the company, the Memorandum does. The Memorandum of Association is unchangeable (except as to certain particulars), but the Articles of Association can be changed by the shareholders. The Memorandum of Association defines the

scope, and the Articles of Association the procedure to be followed in carrying out the scope. An act done against the objects as laid down by the Memorandum of Association, cannot be cured even by the unanimous assent of all the shareholders. But an act done in contravention of the Articles of Association can be cured by the ratification of the shareholders. "With regard to the Articles of Association, those articles play a part subsidiary to the Memorandum of Association. They accept the Memorandum of Association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the power of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the Memorandum of Association, if you find anything which goes beyond the Memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires* not only of the directors of the company, but of the company itself. With regard to the Articles of Association, if you find anything which, still keeping within the Memorandum of Association, is a violation of the Articles of Association, or in excess of them, the question will arise

*Per Lord
Cairns, L.C.
in Ashbury
etc. Co. v.
Riche.*

whether that is anything more than an act *extra vires* the directors, but *intra vires* the company (u)."

*Anandji
Visram v.
The Nariad
etc. Co., Ltd.*

Again in the case of *Anandji Visram v. The Nariad Spinning and Weaving Company, Ltd.*(v), the Bombay High Court held: "The company is, so to speak, identified by its Memorandum of Association. A person, therefore, who is asked to take shares in a projected company of which he is shown the Memorandum of Association, and consents to do so, does so upon the full understanding that the document shown him, or a true copy of it, will be registered as the Memorandum of Association. The company in which he agrees to take shares is the company to be incorporated by the registration of that document as its Memorandum of Association and no other company" (w). The judgment of the Court was delivered by Sarjent, J., but his Lordship had the advantage of having the case of *Ashbury & Co. v. Riche* (x) before him, which was not decided when he delivered judgment in *Jehangir R. Modi v. Shamji Ladha* (y).

To what
classes the
doctrine
applies.

The doctrine of *ultra vires* applies to corporations or such persons as are clothed with

(u) *Per* Lord Cairns, L. C., in *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653 (668).

(v) I. L. R. 1 Bom. 320.

(w) See also *In re Overend Gurney & Co.*, L. R., 2 H. L., 325 (369).

(x) L. R. 7 H. L. 653.

(y) 4 Bom. H. C. R., 185.

the characteristics of a corporation. Thus the Lord Chancellor of England is looked upon as a corporation *sole*, and so is a bishop. In the course of these lectures I shall try and confine myself, as far as possible, to such corporations or statutory bodies as we come across in India. There are many kinds of corporations recognised by the law of England but which do not exist in India. Thus we have no such corporation as a corporation recognised by the Common Law. Nor have we the great religious corporations of England, to suppress whose powers and covetousness the Statutes of Mortmain had to be passed. We have, no doubt, our great religious endowments, but the Statutes of Mortmain were never made applicable to them (z). The doctrine of *ultra vires* will not be made applicable as against them. The Mohunts or Mutwalis are simply trustees, and if they do an act which they are not empowered to do, it will be a breach of trust. They possess property on trust for the attainment and carrying into effect of the purposes for which they were originally created. They are consequently subject to the ordinary rules with respect to the enforcement of trusts. The consequences of *ultra vires* and breach of trust are exactly the

Statutes of Mortmain have no application in India.

Ultra vires and breach of trust.

(z) *Mayor of Lyons v. East India Company*, 1 M. I. A., 175; *Attorney-General v. Stewart*, 2 Mer. 143; *Mitford v. Reynolds*, 1 Phil. 185; *Broughton v. Mercer* 14 B. L. R., 442; *Sarkies v. Prosonnomoyee Dasse*, 1 L. R., 6 Cal. 794.

same; but we arrive at the same conclusion from different processes of reasoning. In the latter case it is a breach of duty which is involved and which invalidates the proceeding. In the former case it is lack of power and, what is more, the Courts refuse to recognize anything like a trust relation as between a corporation and its members.

What these
lectures
will deal
with.

In India we have to deal with the powers possessed by the following bodies:

(1) The Indian Legislature—it is a statutory body created by Act of Parliament with certain powers.

(2) The Provincial Legislatures.

(3) The Governor-General in Council.
The Local Governments.

(4) The High Courts.

(5) The Boards of Revenue.

[The last two bodies are often given powers to frame rules, &c., consistent with certain Acts of the Legislature. And, if in framing such rules they act beyond their powers, their acts are *ultra vires*].

(6) Corporations, which may include

(a) District Boards;

(b) Municipalities.

(7) Joint-stock companies.

(8) *Quasi*-corporations.

In considering the powers of the above bodies we must consider how they came to be created and what powers they possess, expressly

or by implication. What are the results of acts for the performance of which certain formalities, which have to be gone through, are not observed? For instance, a Local Government is given powers to extend the operations of an Act to local areas within its government, and certain things can only be done when the Act is extended to the area. If the Local Government prescribes the acts to be done before or at the time the Act is extended to the area, what will be the effect of the notification? Thus an order made by the Lieutenant-Governor of Bengal under the Bengal Irrigation Act of 1876 was published in the *Calcutta Gazette* on the 28th December, 1881, extending that Act to the district of Burdwan and providing that it should commence to take effect in that district on the 1st January, 1882. But a notification of the same date, purporting to be published under section 6 of the Act, the Lieutenant-Governor declared that the water of certain rivers and channels, including that of the river Banka in the district of Burdwan, would be applied by the Government for the purposes of the Eden Canal. It was held that the notification purporting to be made under section 6 of the Act was *ultra vires* and of no legal effect, having been published before the Act was extended to the district of Burdwan and that the acts of the officers of Government under that notification with regard to the river Banka

were without legal authority (a). Here the Local Government had power to extend the Act and had power also to declare that the river Banka would be applied for the purposes of the Eden Canal. But simply because it did not observe the formalities required, the declaration was held to be null and void.

(a) *The Secretary of State for India in Council v. Nriya Gopal Audhicary*, I. L. R. 28 Cal., 487.

LECTURE II.

The General Nature, Import and Principles of the Doctrine.

In our introductory lecture, we discussed briefly the origin, import and scope of the law of *ultra vires*. The term was defined to mean any act which is in excess of the powers of the person doing it (a). *Stricto sensu*, the term is applicable only to such acts of a corporate body as go beyond the powers given to it, expressly or by implication, by its constituting instruments. But in actual practice this significance of the term is not adhered to. At present, it is used in various senses, only two of which are proper and the rest improper.

Ultra Vires :
Its various significations.

Proper and improper meanings.

Several decisions have been already quoted to illustrate the primary meaning of *ultra vires*. We have seen that the sovereign can create, directly or indirectly, corporate bodies and give them definite powers for the attainment of definite objects. So long as they act within those powers for the attainment of objects for which they were incorporated, their acts are perfectly valid. When however they transcend those powers or engage in acts and transactions foreign to the object of their incorporation,

Primary meaning.

(a) Vide *supra*.

their acts and transactions are said to be *ultra vires*. It should be borne in mind that the said acts and transactions are not, strictly speaking, illegal (though as a matter of fact the epithet illegal is sometimes applied to them); they are *ultra vires i. e.*, beyond authority.

Secondary
meaning.

This is the primary meaning of the term. There is another meaning called secondary. Vice Chancellor Kindersley in *Earl of Shrewsbury v. North Staffordshire Railway Co.* (b), recognised the two senses when he says, "when you speak of *ultra vires* of the company, you mean one or other of two things, either that you can not bind all the shareholders to submit to it or that it is *ultra vires* in this respect that the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbour."

Blackburn J., in *Taylor v. Chichester & Midhurst Ry. Co.* (c), after quoting this passage, develops the distinction indicated therein and points out the legal effects of the same. His view seems to be that the corporation confers on its members certain rights and that it acts *ultra vires* when it overrides the same, even when it acts within its powers or has the consent of the majority of the shareholders to its

(b) 35 L. J. (Ch.) p. 166 (172).

(c) L. R. 2 Ex. p. 356 (358).

acts. Thus he says: "The rights thus conferred on the shareholders as between them and the corporation are very analogous to those between partners *inter se* and depend upon the nature of the terms on which the partners entered on the joint speculation. Any shareholder has a right to object to any act being done which is in contravention of the rights thus given him. Though the majority of the shareholders, or even all but himself approve, yet he has a right to object to the making or enforcing of any contract to do any unauthorized act which would affect his interests."

The distinction explained.

From this it will appear that whereas *ultra vires* in the primary sense has regard to the rights or powers of the corporation, what is *ultra vires* in the secondary sense has regard to the rights or powers of the individual persons who happen to be its members for the time being. The corporation is, in the eye of law, an entity quite distinct from the corporators. The rights and interests of the corporation are not identical with the rights and interests of the corporators. Now it may happen that an act which is within the potential powers of a corporation is not within its actual powers and that it can exercise its potential powers in no other way than by overriding the rights of one or more of the corporators. Such an act

is not absolutely *ultra vires* the corporation, for it has the potential power to do it; yet it is *ultra vires* in as much as it ought not to so exercise its powers as to prejudice the rights of any of its individual members without the consent of the latter.

We come to this then, that in the case of an act which is *ultra vires* in the secondary sense, the corporation can do it with the consent of certain parties, but not in the absence of such consent; but that in the case of an act which is *ultra vires* in the primary sense, it can never do it. From this it would follow "that a shareholder may waive any right which is given to him for his own protection only, and if he has either expressly or tacitly done so, he can no longer object, and neither a stranger nor the body corporate itself can raise such an objection to a contract made by the corporation" (d).

Hercin lies the importance of the distinction between what is *ultra vires* in the primary sense and what is *ultra vires* in the secondary sense. In the former case, generally speaking, the defence of *ultra vires* can be set up by all parties under all circumstances; in the latter, it can only be set up by certain parties (for

(d) per Blackburn J. in *Taylor v. Chichester & Midhurst Railway Co.* L. R. 2 Ex. p. 356.

This point is discussed in *Miners' Ditch Co. v. Zellerbach* 37 California p. 543. See Brice on *Ultra Vires* p. 46.

example by an individual corporator whose rights are likely to be prejudiced by the intended act) under certain circumstances (if, for example, he has not waived his rights).

We have seen that the individual members of a corporation have certain rights which they may enforce against the corporation as also against third parties and that any act in contravention of these rights is *ultra vires*. Now it may be asked whether the recognition of *ultra vires* in this sense is anything more than the fact that the court would, under certain circumstances, prevent the majority of corporators from coercing the minority. Now, though in fact, quite a number of cases of *ultra vires* in the secondary sense are also cases of coercion of the minority by the majority, yet, strictly speaking, the two are quite distinct. There may be cases where there is no harsh or unfair treatment of the minority by the majority; and yet the court would interfere on the ground that the act or transaction in question is *ultra vires* in the sense that the corporation ought not to undertake it, there being opposition from one or more of its members. It seems, therefore, reasonable to recognise the secondary meaning of *ultra vires* as a distinct legal fact—distinct from cases of coercion of the minority by the majority, as also from other kinds of transactions which the

court will not enforce on account of some informality attaching to them.

Improper
meanings.

We shall now consider briefly the improper meanings of *ultra vires*. The term, as has been already stated, has come to be used somewhat indiscriminately. In fact there has been a tendency lately to describe any act which goes beyond authority as *ultra vires*.

1. As we shall presently see, the powers of those who act on behalf of corporations are defined and limited by the constituting instruments. Acts which are in excess of powers so given to them are called *ultra vires*.

2. There are certain acts or transactions which no corporation can do or undertake. These are sometimes called *ultra vires*. For example, the issue of shares transferable by delivery before the English Companies' Act of 1867 was not permitted. Such issue of shares by directors of companies is called *ultra vires* (e). Similarly, payment of dividend out of capital is *ultra vires* (f).

3. The majority of corporators have, as a rule, the power to bind the minority. The courts however will restrain them if their conduct, on account of fraud or harshness or unfair treatment, is considered to be an abuse

(e) *In Re General Company for Promotion of Land Credit* L. R. 5 Ch. p. 363.

(f) *Towers v. African Tug Company* (1904) 1 Ch. p. 558. See also (1904) 2 Ch. p. 234; (1906) 2 Ch. p. 378.

of power. Such abuse of power by the majority has been called *ultra vires*.

4. The powers of subordinate legislatures are defined and limited by their constitution. Any enactment in excess of their powers is *ultra vires* in the sense of being unconstitutional (g).

5. Where the executive authority of a State acts in excess of powers given to it by the legislature, directly or indirectly, it is said to act *ultra vires* (h).

6. And lastly, the acts of trade unions in excess of their powers have been in a recent case described as *ultra vires*: for example, payments out of union funds for purposes not authorised have been restrained as being *ultra vires* (i).

The next question that arises in connection with corporate acts and transactions is: How does a corporation act or transact its business? Obviously it cannot act by itself; it can only act through and by means of certain real persons duly authorised to act on its behalf. Here two topics present themselves for discussion. One of them relates to the exact

Corporation
and its
officials.

(g) Cf. Dicey, "The Law of the Constitution" 7th Edition p. 97 vide *supra*.

(h) Instances of the *ultra vires* acts of subordinate legislatures as also of the executive will be found in chapters III & IV.

(i) *Parr v. Lancashire & Cheshire Mines Federation* (1913) 1 K. B. p.

nature of the relationship that subsists between the corporation and its officials; the other to the requisites and provisions which should accompany the acts and transactions of a corporation and which assure the world that they are its genuine acts and transactions. Under the first head, we shall have to treat of the law of agency as modified in its application to corporate bodies, and under the second, of formalities.

Their
powers.

The officials of a corporation are generally described as its agents, but they are not agents in the same sense as the members of a partnership concern are agents of each other. In the latter, a partner has a general authority to bind his co-partners in respect of all acts and transactions coming within the scope of the partnership business. The officials of a corporation, on the other hand, have their authority limited by the instruments which authorise them to act on behalf of the corporation. Hence it follows that they cannot bind the company in respect of acts and transactions which go beyond their powers or which are not incident to the legitimate exercise of the same. They may make themselves liable, but not the corporation; and those who deal with them should look to them, but not to the corporation. The latter are bound to consult the instruments which authorise the officials. If they do not, it is their own fault.

These points were settled by Lord Wensleydale in the case of *Ernest v. Nicholls* (j). After pointing out that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals, his lordship goes on to observe: "The legislature then devised the plan of incorporating these companies in a manner unknown to the Common Law with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorised to bind all the shareholders by requiring the co-partnership deed to be registered, certified by the directors and made accessible to all.

All persons therefore, must take notice of the deed and provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors it is their own fault, and if they give credit to any unauthorised persons they must be contented to look to them only and not to the company at large."

Two points are made clear in this judgment. (1) A joint-stock company resembles a partnership in certain respects, but the members

(j) 6 H. L. C. p. 419, See also *Smith v. Hull Glass Co.* 11 C. B. p. 897, (926-7): *Re County Life Assurance Co.* L. R. 5 Ch. 288. *Fountaine v. Carmarthen Railway Co.*, L. R. 5 Eq. p. 321. *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. p. 893. *Greenwood's Case*. 3 De G. M. & G. p. 459. *Re Norwich Fire Assurance Society* 58 L. T. p. 38.

of the former cannot bind each other or the company, as those of a partnership. Only those who have authority to do so can. (2) This authority is not a general authority as of a partner in a partnership, but is limited, and those who deal with the company are bound to take notice of the limitations. *Mutatis mutandis*, these remarks would apply to corporations in general.

Formalities.

Formalities are requisites or provisions which accompany the acts and transactions of corporations. They are meant to serve two purposes: (1) they protect the interests of the corporation and its members against the negligence and misdeeds of its agents or officials; (2) their presence indicates to the outside world that the acts and transactions purporting to have been entered into on behalf of the corporation by persons claiming to represent it are the acts and transactions of the corporation itself and not of the said persons in their individual capacity. They are generally classed under three heads: (1) discretionary, (2) directory and (3) imperative.

Discretionary.

Discretionary formalities are those which the officials of the corporation may comply at their own discretion, but for the omission of which they are not held responsible.

Directory.

Those are directory which the corporation can compel its officials to employ or comply

with, but as they do not form an essential part of any transaction, their omission does not, by itself, invalidate the transaction.

As distinguished from the first two are the imperative. imperative formalities which form an essential part of the transaction and the absence of which, generally speaking, renders the transaction void and inoperative. This important distinction between imperative and directory formalities is very well brought out in *Norwich Karn Co. Limited - Ex parte Bignold (k)*.

“In examining the deed for this purpose, it is important to bear in mind an important distinction pointed out by Sir James Wigram in *Foss v. Harbottle* (2 Hare 461) and followed in subsequent cases that the forms prescribed by a deed of incorporation for the government of a company are of two sorts, some are imperative, but others are only directory; some in fact are of the essence of the contract and everything done in violation of it is void, others are merely directory and point out the modes by which the objects of the undertaking are to be accomplished.”

Having pointed out the distinction between the three kinds of formalities we shall now proceed to deal with directory formalities in greater detail.

How far
directory
formalities
affect cor-
porate acts
and tran-
sactions.

As regards those formalities which are clearly directory, the principle of law is that their omission in a transaction does not invalidate the same and cannot be successfully set up as a defence in an action brought against the corporation to enforce claims arising out of the transaction, provided that the person dealing with the corporation has no notice (actual or constructive) of the informality in question. This was decided in *Royal British Bank v. Turquand* (1).

In this case, the plaintiff brought an action to enforce the payment of £1000/- borrowed by the directors of a company on a bond in the name and under the common seal of the company. The directors were authorised by the deed of settlement to borrow on behalf of the company "such sum or sums of money, as shall, from time to time, by a resolution passed

(1) *Royal British Bank v. Turquand* 5 E. & B. p. 259. 6 E. & B. pp. 331-2.

See also *County of Gloucester Bank v. Rudry Merthyr Steam & Home Coal Colliery Co.* (1895) 1 Ch. 629; *In Re Hampshire Land Co.* (1896) 2 Ch. 743. *In Re Land Credit Company of Ireland, ex parte Overend, Gurney & Co.* (1869) L. R. 4 Ch. 460.

In Re County Life Assurance Company (1870) L. R. 5 Ch. 288. *Mahony v. East Holyford Mining Company* (1875) L. R. 7 H. L. 869.

In Re Scottish Petroleum Company (1883) 23 Ch. D. 413. *Biggerstaff v. Rowatt's Wharf Limited* (1896) 2 Ch. 93. *In Re Bank of Syria* (1900) 2 Ch. 272. (1901) 1 Ch. 115.

Shaw v. Port Phillip Gold Mining Company (1884) 13 Q. B. D. 103. *Ruben v. Great Fingall Consolidated* (1904) 1 K. B. 650, also 1 L. R. 36 Bom. 564.

at a general meeting of the company, be authorised to be borrowed." The company resisted payment on the ground that no resolution of any general meeting of the company was at any time passed authorising the making of the bond. It was held by Lord Campbell "that the bond cannot be rendered illegal and void from any irregularity in the proceedings of the company, nor even by an excess of authority, the plaintiff having acted with good faith and the shareholders not being prejudiced." The case was referred to the Exchequer Chamber. Jervis C. J. in affirming Lord Campbell's judgment said that the directors having an authority under the deed of settlement to borrow in the name, and under the common seal of the company, the plaintiffs, the creditors, had a right to infer that the former had done all such acts (viz, resolutions and so forth) as were necessary for making that authority complete for the legitimate exercise of the same.

Here the passing of a resolution by the company prior to the directors' exercise of their power to borrow is a directory formality. The court held accordingly that its omission did not render the borrowing transaction invalid as against creditors who had acted in good faith.

It would be instructive to compare this case with *Irvine v. The Union Bank of*

Australia (m), the facts of which are as follows:—By the deed of settlement of a company it was provided that the directors' power to borrow should not exceed a certain amount, though the power could be extended by the vote of one half of all the shareholders at a general meeting. The directors borrowed from time to time sums which exceeded the amount fixed by the deed of settlement. The court on being satisfied that no resolution had been passed prior to the borrowing transactions, extending the directors' power to borrow, nor there being any subsequent ratification of the same, held that the plaintiffs were not entitled to recover. Sir Barnes Peacock in giving the judgment of the court said: "This case should be distinguished from *Royal British Bank v. Turquand*. In that case Chief Justice Jervis remarked that the lender finding that the authority might have been made complete by a resolution had a right to infer the fact of a resolution."

In the present case however the Bank would have found that by the Articles of Association the directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the directors had been enlarged by a resolution, a copy of that

(m) 2 A. C. 366.

See also *Grant v. United Kingdom Switchback Ry. Co.*, 40 Ch. D. 155 (139).

resolution ought in regular course to have been forwarded to the Registrar of Joint Stock Companies in pursuance of sec. 153 of the Companies' Act and would have been found among the records."

The *ratio decidendi* in *Irvine v. The Union Bank of Australia* seems to be that as the directors were expressly forbidden to borrow beyond a certain amount, unless their power had been previously enlarged by a resolution of the shareholders which would in due course find its way into the records of the Registrar's office, the plaintiffs were under an obligation to enquire whether in fact any such resolution as aforesaid had been passed and that having failed to do so, they had been affected with constructive notice of the informality, even though they had no actual notice of the same.

The two cases cited above have made the law as regards the liability of corporations in respect of transactions which are informal owing to the omission of a directory formality fairly clear. The courts will not allow a corporation to go-cots free merely because some provision or other relating to its internal management or concern had been omitted. On the other hand, they would hesitate to give relief to a person dealing with the corporation who had knowledge of the informality and whose duty it

was, therefore, to get the same rectified by bringing it to the notice of the members of the corporation. The courts have a duty towards the public as well as towards the members of the corporation, and the whole law on the subject of formalities, as we shall see, is based on a recognition of this double duty.

Omission of
directory
formalities
may be
cured by
ratification.

The omission of a directory formality, we have seen, does not affect the rights of third parties dealing with the corporation in good faith. But the law on this point goes further. Where the omission of the directory formality in a transaction has been ratified or acquiesced in by those who are competent to act on behalf of the corporation, the latter will be estopped from setting up the informality as an answer to any claim arising out of the transaction. Here the question whether or not the other party to the transaction was aware of informality is immaterial. Mere ratification or continued acquiescence (provided it does not amount to a fraud upon the corporation) serves as a waiver of the informality. The leading case on this point is *Bargate v. Shortridge* (n).

By the deed of settlement the shareholders of a banking company were not allowed to transfer their shares except upon notice to the

(n) 5 H. L. C. p. 297. 24 L. J., (Ch.) p. 457.

See also *Murray v. Bush* L. R. 6. H. L. 37.

Re Royal British Bank, Walton's Case. 26 L. J. (Ch.) 545.

directors and on the consent thereto of a Board of Directors. Such consent had to be signified in writing signed by three directors at the least. Shortridge, one of the shareholders, transferred at different times, his shares to different persons. He sent proper notice to the directors and received back consent signed by the directors on which he made the transfers. Afterwards the bank got into difficulties and the directors as well as the creditors sought to impeach the validity of the transfers on the ground that the certificates of consent were not in fact signed by a Board of Directors as required by the deed of settlement. The decision of the House of Lords was that the transfers were valid. "The question is", said Lord St. Leonards, "whether or not a long course of dealing by a corporation, contrary not to the real interests of the company or the bona fides of the transaction, but contrary to some of the terms of the deed under which the company was formed, shall or shall not be held to disentitle such company to object to the particular rights, acquired by that course of dealing, as acquired in disregard of the deed of settlement." The deed required that consent should be given in a particular form. But the directors having disregarded it not only in their dealings with Shortridge but from the very foundations of the company could not impeach the validity of the transactions they had entered into.

What are
directory
formalities?

There remains one more question to deal with viz:—What are directory formalities? From what has been already stated it will appear that formalities dealing with the internal arrangements and proceedings of a corporation are, generally speaking, construed as directory. Such formalities relate to the calling of meetings of corporations; serving of notices of such meetings; passing of resolutions by them; mode of doing business by officials; signing of documents by them; getting the consent of any particular official prior to the affixing of the common seal and so on.

As regards some of these matters, the necessary formalities are laid down by the constating instruments. But the public can have no knowledge as to whether in every case they have been complied with. They have a right to assume that every thing has been done *et modo & forma*. Hence, as we have seen, their absence does not vitiate the transactions. There are other formalities beside these, which are known only to the officials of the corporation and perhaps also to its members. *A fortiori*, their omission does not render any transaction invalid.

In *Montreal and St. Lawrence Light and Power Company v. Robert (o)*, the company tried to set aside a purchase on the ground that

(o) L. R. (1906) A. C. p. 196 (203).

the resolution of the directors which authorized the completion of the purchase had been passed by an insufficient quorum. It was held that the purchase, being *ultra vires*, after the lapse of a specified time, became absolute. Lord Macnaughten in delivering the judgment of the court said: "It is quite true that the bye-laws require the presence of three directors to make a quorum and only two attended on the 17th. But after all the bye-laws of a company are not public property. They concern matters of internal management. Those who deal with them have no means of access to them. There was nothing to put Robert on inquiry. The officials of the company furnished him with a copy of a resolution which purported to be a resolution of the directors duly and regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor, "you should not have given credit to what our people told you." If such a plea were listened to, no one would be safe in dealing with a company having private regulations of its own, inaccessible to the outside world, to which appeal could be made in case of need, to relieve it from solemn obligations or save it from a bad bargain."

We now come to the subject of imperative formalities. Formalities are means devised by the legislature or by the corporation itself for

Imperative
formalities.

the purpose of protecting its interests. They are of the nature of restrictions imposed upon its officials to prevent them from rushing into hasty and unfortunate transactions. Who is to suffer if the officials do not take care to observe them? Several decisions have been quoted to show that in the case of directory formalities third parties with no knowledge of the informality can enforce informal acts and transactions in their favour. But this they cannot do if the formality is construed by the court to be an imperative one. The question, then, what is an imperative formality is a very important one. The courts in deciding it have had to keep the balance even between two complicating acts or interests: (1) those of the corporation, and (2) those of the public at large; and it is not easy to say how far it has been successful in its attempt. A careful perusal of the numerous decisions which have turned on this point would lead one to conclude that no general proposition can be laid down which would unmistakeably guide us in every case in distinguishing between an imperative formality and a directory one. The courts have taken the facts of each case into consideration and have tried to give a decision consonant with the principles of law and equity. Still the following propositions may be tentatively enunciated.

First, it may be laid down that if the

constating instrument of a corporation, whether a deed of settlement or a legal enactment, special or general, states definitely that certain formalities must be observed in connection with transactions of a certain class, courts will construe the same as imperative. A series of decisions illustrate this proposition.

Express
formalities.

In *Homersham v. Wolverhampton W'works* (p), the company was exempted from making payment in respect of work done in excess of and outside the contract which was under seal, on the ground that there had been no contract in respect of such extra work in terms contemplated by the general and special acts which governed the company.

In *Leominster Canal Co. v. Shrewsbury etc. Railway Co.* (q), an agreement on the part of the defendant company to purchase the canal of the plaintiff company was not enforced on the ground that the agreement was not under seal or signed by two directors of the railway company as required by the 97th. section of the Companies' Consolidation Act (8 & 9 Vic. c. 16). This was exceptionally hard on the plaintiff company, as on the faith of the agreement they had withheld their bonafide opposition to an Act of Parliament in favour of the defendant company and had

(p) 6 Exch. 137. 20 L. J. (Ex.) 193.

(q) 3 K. & J. 654. 26 L. J. (Ch.) 764.

themselves obtained an Act authorising the sale and purchase of the canal and had made certain payments by way of part-performance.

So in *Kirk v. Bell* (r), the deed of a joint stock company required that the directors should not be more than seven or less than five, and that three or more should constitute a Board and be competent to transact all ordinary business. In course of time, the number of directors was reduced to five. Four of them executed a deed compromising a large debt due to the company in lieu of a certain mining concern and covenanted with the debtor to indemnify him against certain Bills of Exchange. The debtor brought an action against the company for not indemnifying him. It was held that the covenant was not binding on the company, for the transaction in question was not ordinary business and no smaller number than five was competent to put it through.

Formalities
imposed by
legislature.

The doctrine of imperative formalities assumes special importance in the case of formalities imposed by the legislature in mandatory language. If the legislature declares that some business or transaction should be done in a particular manner and lays down the various steps of procedure, the courts require strict adherence thereto. In the absence of such adherence, the transaction is void and the

corporation, however just may be the demands against it, may be exempted from satisfying them. Thus in *Hanson and another v. Corporation of the Village of Grand Mère* (s), where the respondent corporation had guaranteed debentures to a certain amount to be issued by a company by a bye-law framed under the Towns Corporation Act, (C. I. tit. 11 Revised statutes of Quebec, 1888) it was held that the bye-law was *ultra vires*, in as much as it had not been submitted to the municipal electors for their sanction nor to the Lieutenant-Governor, as it should have been under the provisions of the Act. The legislature required that the bye-law in question should have been approved by the majority of the whole body of ratepayers and sanctioned by the Lieutenant-Governor. As it was admitted that the bye-law was not even submitted to the electors for their approval or to Lieutenant-Governor, the Judicial Committee of the Privy Council decided that the bye-law was *ultra vires* and the guarantee inoperative.

Suppose, however, that, in fact, the bye-law was submitted to the electors, but that the authorities did not observe all the formalities which the legislature had laid down in relation to such submission, would the informality render the bye-law void? Brice on the

strength of decisions of the United States courts is inclined to think that the latter formalities are merely directory and that their non-observance would not render the whole transaction void. "Thus if the legislature provides, in addition to obtaining a vote, holding meetings etc., certain formalities as to time, place, or manner of obtaining such vote, &c. these additional requisites will—at least as regards innocent parties—be deemed discretionary, provided the vote has been *defacto* taken, the meeting held, &c." (t).

Municipalities and similar public bodies are charged to enter into certain classes of contract under certain formalities. These formalities are generally construed as imperative and their absence renders the contract void. The courts have gone so far as to hold that in a contract where there has been omission of an imperative formality, the Municipality can be charged with no liability whatsoever, even in respect of work done by the other party in pursuance of the contract.

Section 174 of the Public Health Act of 1875 requires that every contract made by an urban authority, whereof the value or amount, exceeds £50 must be in writing and sealed with the common seal of such authority. In the case of *Young & Co. v. The Mayor etc.*

(t) *Ultra Vires* pp. 610-1.

of *Royal Limington Spa (u)*, an engineer had done certain works for the corporation, but there was no contract according to the provisions of the section. It was contended on behalf of the plaintiff that as the contract had been performed by the plaintiff and the defendant had the benefit of plaintiff's work, labour and materials, the defendants at all event were liable to pay a fair price. Lindley L. J. in overruling the contention observed as follows : "In support of this contention cases were cited to show that corporations are liable at Common Law *quasi ex contractu* to pay for work ordered by agents and done under their authority.....We have here to construe an Act of Parliament.....But contracts for more than £50 are positively required to be under seal, and in a case like that before us, if we were to hold the defendant liable to pay for what has been done under the contract, we would in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them" (v). In India Municipalities, District Boards etc. are allowed by statute to enter into certain kinds of contracts under certain formalities.

(u) (1883) L. R. 8 App. Cas. 517.

(v) L. R. 8 Q. B. D. p. 579 at p. 585.

See also *British Insulated Wire Company Ltd. v. The Prescott Urban District Council* L. R. (1895) 2 Q. B. p. 463.

Our courts, following the decisions of English judges, have construed them as imperative and held their absence to vitiate the contract *ab initio* (w).

We have said that the terms imposed by legislation in mandatory language are construed as imperative. We may go further and say that the terms or provisions imposed by the constituting instruments of a corporation, though not contained in any legislative enactment, would be held by the courts to be imperative, provided the language is mandatory. *Harben v. Phillips* (x) is a case in point. There by the Articles of Association of a company it was provided that a share holder could vote by proxy. But there was a provision which required that the instrument appointing the proxy should be attested. Chitty J. held that this provision was not merely directory, but that attestation goes to the validity of a proxy, and that proxies who are not attested were invalid. (y).

(w) See *Radhakishan Das v. The Municipal Board of Benares* I. L. R. 27 All. p. 592.

Ramaswami Chetty v. Municipal Council of Tanjore I. L. R. 29 Mad. p. 360.

Ahmedabad Municipality v. Submanji I. L. R. 27 Bom. 618.

Abaji Sitaram v. Trimbak Municipality I. L. R. 28 Bom. 66.

Chairman South Barrackpur Municipality v. Amulya Nath Chatterjee I. L. R. 34 Cal. 1030.

(x) 23 Ch. D. p. 14.

(y) The question as to what language is mandatory is not easy of answer. The following cases may be referred to :—

Kerr v. Corporation of Preston 6 Ch. D. p. 463.

The corporation has got the right under certain conditions to deprive its members of their rights, interests and franchises in the corporation. While exercising such a right, it is absolutely incumbent on the corporation to comply with all requisites and provisions laid down either by the legislature or by its own constating instruments or by any rules of procedure which it has framed for its own guidance and for that of its members. The courts construe formalities for the purpose of effecting a forfeiture as strictly imperative. As James, L.J., says: "It was the established case of the Court of Chancery that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is therefore bad, and the forfeiture invalid."

Forfeiture
of rights.

The principle stated above has been followed in a large number of cases. In many

Julius v. Bishop of Oxford 5 A. C. p. 214.

Liverpool Borough Bank v. Turner 2 De G. F. & J., p. 502.

Re General Provident Assurance Co. 38 L. J. (Ch.) 320.

Caldow v. Pixell 2 C. P. D. p. 567.

Howard v. Bodington 2 P. D. p. 203.

Hughes v. Sutherland 7 Q. B. D. p. 160.

Batthyany v. Bouch 50 L. J. (Q. B.) p. 421

Williams' claim—Re Great Eastern Steamship Co. 53 L. T. p. 594.

Black v. Williams (1895) 1 Ch. p. 408

of them a very slight inaccuracy or omission has been considered fatal. Thus in *Watson v. Eales* (z), a forfeiture of shares was set aside on the ground that a notice to forfeit "on Monday the 7th" was insufficient, as the 7th was a Friday. In *Cockervell v. Van Diemen's Land Co.* (a), a forfeiture was declared bad in as much as no notice of forfeiture was left for the shareholder at his usual or last place of abode within the meaning of the Act which governed the company. In *Johnson v. Lytle's Iron Agency* (b), a forfeiture was held invalid, on the ground that the notice of forfeiture claimed interest from the date of the call, instead of from the date fixed for payment.

In *Bottomley's Case* (c), where the articles provided that the business of the company should be conducted by not less than a specified number of directors, it was held that a forfeiture made on non-payment of a call, by less than the specified number was invalid.

So in *New Chile Gold Mining Co.* (d), a former shareholder whose shares had been forfeited for non-payment of calls was allowed to prove for damages in the subsequent liquidation of the company in as much as the

(z) 23 Beav. 294. Compare L. R. (1910) A. G., p. 317.

(a) 1 C. B. (N. S.) 732.

(b) 5 Ch. D. 687.

(c) 16 Ch. D. 681.

(d) 45 Ch. D. 598.

directors had not given him any notice that if he failed to pay on or before the day appointed for payment, they might forfeit his share.

The effect of the omission of imperative formalities is much the same as that of *ultra vires* transactions.

Effect of neglecting imperative formalities.

First, no suit will lie on the transaction itself as it is void *ab initio*. But if one of the parties has received any benefit under it, he might be made liable to account for it, or if third parties have acquired rights under it, they might be entitled to relief on equitable principles (e). Again, the absence of a formality in a transaction will render it void, but only to the extent of the formality in question. Thus an instrument executed by the corporation may be void as a mortgage or a charge owing to the omission of a formality. Yet it may be binding as a bond (f). And similarly

(e) *Re Romford Canal Co.*, 52 L. J. (Ch.) 729. —

But see *Young & Co. v. The Mayor of Royal Leamington* (1883) L. R. 8 App. Cas., 517.

British Insulated Wire Company, Ltd. v. The Prescott Urban Council (1895) 2 Q. B., 463.

Also *Radha Kissen Das v. Municipal Board of Benares*, I. L. R. 27 All. 592.

Ramaswamy Chetty v. The Municipal Council of Tanjore, I. L. R. 29 Mad. 360.

Govind Chandra Dutt v. Chairman of Howrah Municipality, (Special Appeal No. 1828 of 1891, decided on the 5th of June 1894).

(f) *Re Romford Canal Co.*, 52 L. J. (Ch.) 729. But see also *Scott v. Colburn*, 26 Beav. 276; *McMasters v. Reed*, 1 Grant's cases, 36.

a bond may be void through some informality, but an action will lie on the debt (g).

Secondly, though it has been asserted that mere lapse of time does not disentitle the suffering party to an equitable relief, yet there may be such a delay followed by such a change of circumstances that it would be inequitable to set aside the transaction unattended by the requisite formalities (h).

And lastly, systematic disregard of imperative formalities may be considered a good reason for upholding informal transactions. This was the point of decision in *Walter's* case. The deed of settlement of the company laid down that, in the case of transfer of shares, certain formalities should be complied with, otherwise the transfer would have no force either in law or in equity. Fifty shares belonging to the company were transferred and accepted by the transferee but none of the above formalities were complied with except that an entry of the transaction was made in the share-ledger of the company. The Vice-Chancellor in giving judgment said: "The formalities required by the deed may not have been, and I assume them not to have been, strictly attended to, or wholly carried into effect ;

(g) *D'Arcy v. Tamar, &c., Ry. Co.*, L. R. 2 Ex. 158 at p. 162 per Bramwell, B. *Kipling v. Todd*, 3 C. P. D., 350.

(h) *Re Florence Land & Public Works Co. Nicol's case, etc.*, 29 Ch. D., p. 421 at pp. 429, 435, 436 per Chitty, J.

but, throughout all the transactions
 the requisitions and conditions
 of the deed were (I may say) systematically
 disregarded There must
 be taken to have been an universal assent, as
 it seems to be, to disregard its provisions." It
 was held accordingly that the transferee should
 be placed on the list of contributories (*i*).

The corporation as we have said more than
 once acts through its agents. Of these, there
 are some who are entrusted with the control
 and management of the affairs of the corpora-
 tion. They are styled variously as directors, com-
 missioners, trustees and so forth. In the execu-
 tion of their work, they are required to comply
 with various kinds of formalities laid down
 either by an Act of the Legislature, general or
 special, or by custom or by their constating
 instruments. We shall not enter into this
 subject here as it will be dealt with in a
 subsequent chapter.

Formalities
 relating to
 the manag-
 ing body.

In our treatment of directory formalities
 we saw that their omission could be cured by
 ratification. What is ratification? We shall
 now go into this subject somewhat fully.

Ratification.

By ratification is meant the act or acts
 by which a person on whose behalf an act has
 been done without his authority adopts it as

(*i*) *Walter's case—Re Vale of Neath, &c.*, 3 De G. and Sm.
 149 at 156 See also *Bargate v. Shortridge*, 5 H. L. C., 297

his own. Its principles are as old as any proposition known to law, and are applicable to individuals and corporations, regard being had to the limited capacities of the latter. Ratification may be either *express* as, for example, when the shareholders assembled in a meeting pass a resolution approving an unauthorised act of its directors; or *implied*. A ratification is said to be implied when it is not expressly made by those who are competent to make it, but may be reasonably inferred from their conduct. For example, when the shareholders have notice (actual or constructive) that an irregular or unauthorized transaction has taken place and take no steps to repudiate it, the courts will construe their silence and acquiescence in the irregularity as amounting to a ratification. This was established by *Phosphate of Lime Company v. Green (j)*.

Express.

Implied.

Acquiescence.

By its articles of association, the *Phosphate of Lime Co.* was expressly prohibited from purchasing their own shares. The defendants who had bought four hundred shares, being unable to take them up, borrowed £6500 from the company. When called upon to repay this amount, they entered into an agreement with

(j) L. R. 7 C. P., 43.

See also *London Financial Association v. Kell* 26 Ch. D. p. 107 at p. 152. *Ho Tung v. Man on Insurance Co., Ltd.*, (1902) A. C., 232.

the directors by which the latter accepted the four hundred shares, which they thereupon cancelled in satisfaction of the debt and gave them a discharge. At a meeting of the shareholders held subsequently it was agreed that the company should go into liquidation and its business be transferred to a new company with a reduced capital. At this meeting an account was handed round in which the sum of £4000 was set down as the price of the shares cancelled and the account of the defendants was credited with £4000 as per shares' forfeited account. In an action brought by the liquidator of the old company for the recovery of the £6500, it was held that the shareholders had by their acquiescence ratified what they had done, in as much as the shareholders in assenting to the transfer of the old to the new company had knowledge or the opportunity or means of knowledge that such transfer was in part based upon the cancellation of the 400 shares.

As to what would amount to an implied ratification, Brett, J., said: "Now in order to establish a case of ratification, it seems to me not necessary to prove absolute knowledge on the part of the shareholders
 It was sufficient to show that facts were made known to the shareholders, into the effect of which they might and ought to have inquired, and to which they ought to have

What constitutes implied ratification.

objected at the time, unless they intended to adopt the transaction" (k).

From the passage quoted above, it is abundantly clear that for purposes of implied ratification, actual knowledge of the transaction in question is not necessary. If the shareholders are in possession of the *means* of knowledge, that is, knowledge of such facts as would, if followed up, lead them to the actual knowledge of the transaction, they would be held to have ratified the same, if they did not take, in time, any steps to repudiate it. But it should be borne in mind that to hold the shareholders responsible, it is not enough to prove that they knew that certain transactions, which in fact were irregular or unauthorised, had taken place: it must be proved further that they knew that the transactions in question were irregular or unauthorised. This was decided in *Spackman v. Evans* (l).

By the deed of settlement, the members of a joint-stock company were allowed to retire on certain terms. The company got into difficulties and it was agreed at a meeting of the shareholders that on certain conditions dissenting members might withdraw. Spackman, one of the shareholders, entered into an agreement

(k) L. R. 7 C. P. 43.

(l) L. R. 3 H. L. 171.

with the directors which allowed him to retire on conditions which were not those named in the deed of settlement nor those which were agreed to at the meeting referred to. No notice of the conditions arranged between Spackman and the directors was communicated to the shareholders, though the fact of his retirement was known to them. Twelve years afterwards a winding up order was made and Spackman's name was placed on the list of contributories. He objected, but the Court upheld the liquidator.

The plaintiff contended, among other things, that, assuming that the act of the directors in allowing him to retire on conditions other than those named in the deed or agreed to at the meeting already spoken of was *ultra vires* the directors, the subsequent conduct of the shareholders amounted to a ratification. Lord Cranworth said: "Looking to all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular" (m). His lordship found that in the

(m) L. R. 3 H. L. 171 at p. 194.

See *Re Florene Land and Public Works. Nicol's Case*. 29 Ch. D. 421 at pp. 435, 436, per Chitty, J. "Well, the persons who did this, that is to say, placed the shares in Mr. Davies' name, were the new directors, and they were acting as agents of the company, but after the lapse of nine years, when the

present instance no such knowledge could be imputed to the shareholders. They had the balance-sheets which showed cancellation of a large number of shares. But there was nothing to show that these cancellations were based on transactions, illegal or irregular.

For the purpose of proving acquiescence, then, it is necessary to prove knowledge (actual or constructive) of the irregularity or illegality in question. Mere lapse of time is not evidence of such acquiescence. As Lord Chelmsford observed in the case cited above: "It is necessary to consider the question of acquiescence apart from that of time But mere time alone would never, in my opinion, grow into acquiescence."

When a corporation has received notice (*n*) (actual or construction) of an irregular or unauthorised transaction, it is its plain duty immediately to take steps to repudiate it. If it does not act promptly, but allows time to elapse, it will not be allowed to repudiate afterwards and will be bound by the irregularity. This point is well brought out in Lord

company has gone on and held its meetings and carried on all business on the footing of Mr. Davies and his nominees being the shareholders, would not the company be deemed to have acquiesced in that which, on the hypothesis, was a mere excess of authority on the part of the directors." (The *Italics* are mine).

(*n*) On what constitutes notice, see further *Re Norwich Equitable Fire Assurance Society* 27 Ch. D. 515.

Boschoek Proprietary Co. v. Fuke (1906) 1 Ch. 148.

THE GENERAL NATURE &C. OF THE DOCTRINE. SI

Romilly's judgment in *Heyman v. European Central Railway Co.* (o).

In this case, a shareholder claimed to have his name removed from the list of shareholders on the ground that there had been suppression of material facts on the part of the directors. The court decided that there had been no such suppression; that even if there had been, the plaintiff had lost all his rights to relief by his delay. His Lordship observed: "There are three months at least and a portion of two more which he allowed to pass over without taking any step whatever. . . . It is obviously of the utmost importance in these cases that a shareholder should come at the earliest opportunity."

The next question in connexion with ratification is, what acts may be ratified?

What acts
may be rati-
fied.

It has been established beyond controversy that an act which is absolutely *ultra vires* the corporation cannot be ratified. The leading case is that of *Ashbury & Co. v. Riche*(p). It was argued in the Exchequer Chamber and the House of Lords. Both the courts affirmed the principle that a contract which is absolutely *ultra vires*, and therefore void at its inception, cannot be made valid by subsequent ratification. Blackburn, J., said: "I do not entertain any doubt

(o) 7 Eq. 154 (169).

(p) 7 H. L. Cases 653.

that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, every court is bound to treat a contract entered into contrary to the enactment as illegal and therefore wholly void, and to hold that a contract wholly void cannot be ratified" (q).

But an act which is not absolutely *ultra vires* the corporation but *ultra vires* merely in reference to the rights of its corporators, (that is to say, *ultra vires* in the secondary sense), may be ratified. We have seen that the corporation can do certain acts with the assent of all the corporators which would otherwise be *ultra vires*. But whatever the corporation may validate by their previous assent thereto, they can also validate by subsequent ratification. Hence acts which are *ultra vires* in the secondary sense may be ratified.

"It is upon this principle," says Mr. Brice, "though certainly it was not made the *ratio decidendi*—that *Phosphate of Lime Co. v. Green* may be supported. It was not absolutely outside the power of the company to cancel the shares there in dispute it was however not within its

active powers then actually existing, and consequently it was *ultra vires* in the secondary sense—but having been acted upon and acquiesced in for a long time under circumstances which justified the inference that all the members were cognizant of, and not desirous to upset the proceeding, the presumption necessarily followed that they had approved and affirmed that which they could by taking the ordinary measure have directed before-hand” (r).

In *Towers v. African Tug Company(s)*, it was held that a shareholder in a limited company who with full notice or knowledge of the facts, himself received part of the proceeds of an *ultra vires* act committed by the directors—such as a payment of dividend out of capital—and who still retained the money, could not, either individually or as suing on behalf of the general body of shareholders, maintain an action against the directors—apparently among other grounds on the ground of acquiescence.

Further, as we have already seen, acts which are merely *ultra vires* the officials of a corporation, but *intra vires* the corporation may be ratified. We need not labour this point as a

(r) Brice on *Ultra Vires* p. 634. It is worth noticing that in *Phosphate of Lime Co. v. Green* none of the learned judges seem to have considered whether the transaction was within the limits of the memorandum or consistent with the provisions of the Acts.

Trevor v. Whitworth 12 App. Cas. 409 at pp. 426-7.

(s) (1904) 1 Ch p. 558.

good many cases have already been cited in its support. But ratification of a past act *ultra vires* the officials does not extend to similar acts in the future. If the officials commit any illegality or irregularity, that may be cured by the corporators, if it is within their power to do so. But this ratification does not justify the officials in committing similar illegality or irregularity in the future. This was laid down in *Irvine v. The Union Bank of Australia*(t). There a company provided that the directors' power to borrow on the credit of the company should not exceed a certain amount, though the directors could extend their power by one-half of the votes of all the shareholders given at a general meeting. The directors borrowed sums from time to time on credit. They obtained, without any authority, a letter of credit for £10,000 which was subsequently ratified. This letter of credit expired on the 29th March, 1869, but it was renewed and a sum of £10,000 was borrowed on it. It was held that the ratification of the letter of credit for £10,000 by the shareholders did not authorize the renewal of it or the acting upon it, after the time originally limited had expired. "There is," said Sir Barnes Peacock, "a wide distinction between ratifying a particular act which has been done in excess of authority and

(t) 2 A. C. 366.

conferring a general power to do similar acts in future" (u).

And lastly, acts which are irregular owing to the omission of a directory formality may be rendered valid by ratification. This follows from the very nature of directory formalities. But acts which are void *incepto* owing to the omission of an imperative formality can not, generally speaking, be ratified and made binding. They, as we have seen, form an essential part of the transaction and in their absence, the transaction is void *ab initio*. But even here, under certain circumstances, the courts will allow the principle of ratification to operate. For example, a transaction which is void owing to the omission of the seal may be acquiesced in and the parties may be held liable (v).

There remains one more question to be dealt with before we conclude this lecture viz., on whom is the *onus* of proof to show that the act or transaction complained of is *ultra vires*.

Burden of proof in questions of *ultra vires*.

Corporations, as we shall see, have all such powers as are expressly or by implication given to them either by the legislatures, or by Common Law, or by their own constating instruments. It is clear that in regard to acts

(u) 2 A. C. 366.

(v) *Ecclesiastical Commissioners v. Merrill*, L. R. 4 Ex. 163; *Walter's Case : re Vale of Neath* 3 De G. & Sm. 147; *Walton's Case : Re Royal British Bank* 26 L. J. (Ch.) 545. *Bargate v. Shortridge* 5 H. L. C. 297.

and transactions which are apparently within their powers, express or implied, they will be presumed to be valid, unless those who impeach their validity are prepared to prove the contrary. But these are not the only powers which a corporation has. It is now established that in addition to its expressed and implied powers, a corporation has power to do all such acts as are incidental to, and may reasonably and properly be done under and along with, the main objects of its incorporation (*w*). The question is, in reference to these acts, on whom is the *onus* of proof to show that they are valid or invalid? The older authorities are inclined to take the view that the burden of proof is on the party who sets up their validity. Thus it is stated by the Court of Common Pleas in *East Anglian Railway Co. v. Eastern Counties Railway Co.*: "It is clear that the defendants have a limited authority only and are a corporation only for the purpose of making and maintaining the railway sanctioned by the Act and that the funds can only be applied for the purposes directed and provided for by statute" (*x*).

From this it would seem that the *onus* of proof in reference to such transactions as are

(*w*) *Attorney-General v. Great Eastern Ry. Co.* 5 App. Cas. 473 at p. 478. *Small v. Smith* 10 App. Cas. 119.

Shannugger Jute Factory Co. v. Ram Narayan Chatterji. I. L. R. 14 Cal. p. 189 at p. 196.

(*x*) 11 C. B. p. 775.

incidental to and may reasonably and properly be done under the main objects of incorporation would be on the person who sets up their validity. But the more recent authorities are not prepared to accept this view, as would appear from what Lord Wensleydale says in *Scottish North-Eastern Railway Co. v. Stewart*. "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is created or registered expressly or by necessary implication prohibit such contract between parties. *Primâ facie*, all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided" (y).

This is perhaps going from one extreme to another. The doctrine of *onus* of proof must be reasonably applied by the court, having regard to the special facts and circumstances of the case before it. It may, however, be asserted that, generally speaking, the acts of a corporation are to be assumed to be valid and that it is for the party who challenges their validity to show the contrary. But in regard to acts which are clearly and manifestly beyond its powers, no such presumption as to their validity will be made and the *onus* of proof would be on the party who sets it up.

(y) 3 Macq. 382 at p. 415.

LECTURE III.

The Government of India.

In this chapter and the following we shall discuss the powers of the Government of India and the local Governments with special reference to the doctrine of *ultra vires*.

The powers of the Government of India are of a two-fold character, executive and legislative. The former are exercised by the Governor-General in Council composed of (I) the Governor-General (II) the ordinary members and (III) the extra-ordinary members (if there be any). The latter are exercised by the same body enlarged for the purpose of legislation by the addition of nominated and elected members. The Governor-General in Council constituted as above for purposes of legislation will be referred to as the Indian Legislature.

Now as to the powers of the Indian Legislature.

The Indian Legislature as it exists today was established by the India Councils Act (24 & 25 Vict. c. 67.) in 1861. Section 22 of the Act enacts as follows:—

The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained to make laws and regulation . . . Provided

always, that the Governor-General in Council shall not have power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act :

Or any of the provisions of the Acts, 3 & 4 Will. IV. c. 85 and 16 & 17 Vict. c. 95 and of 17 & 18 Vict. c. 77, which after the passing of this Act shall remain in force :

Or any provision of Act, 21 and 22 Vict., c., 106 entitled ' An Act for the better government of India ' ; or of the Act, 22 and 23 Vict., c., 41 to amend the same :

Or any Act enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India :

Or of the Acts for punishing mutiny or desertation in Her Majesty's army or in Her Majesty's Indian forces respectively ; but subject to the provisions contained in the Act, 3 & 4 Will., IV. c., 85, s. 73, respecting the Indian Articles of War :

Or any provisions of any Act passed in the present session of Parliament, or hereafter to be passed, in any wise affecting Her Majesty's Indian territories, or the inhabitants thereof :

Or which may affect the authority of Parliament, or the constitution or rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon

may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories”.

It is clear from the section quoted above that the Indian Legislature like Colonial Legislatures is limited in its powers. It has not got the omnipotence of Parliament. In the first place, its powers are derived from statutes passed by Parliament and may be taken away by Parliament. In the second place, it has been invested with the power of making laws and regulations on certain specified subjects. And lastly, its general powers to legislate on those subjects have been restricted by certain prohibitions.

The powers of the legislature of this country have been the subject of judicial controversy. The leading case is *R. v. Burah*(a). In that case Lord Selbourne discussing the constitution of the Indian Legislative observed as follows: “The Indian Legislature has powers expressly limited by the Act of Imperial Parliament which created it; and it can of course, do nothing beyond the limits which circumscribe those powers. But when, acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of

(a) L. R. 3 App. Ca. 889. s. c. I. L. R. 4 Cal. 172.

legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which negatively they were restricted."

From the words quoted above it is clear (1) that the Indian Legislature is limited in its powers; (2) that the Courts of Justice are entitled to enquire whether the Legislative has in any particular case acted beyond its powers and (3) that though the Indian Legislative derived its powers from Parliament, it is not an agent of the latter, but that it exercises powers as large, and of the same nature, as the latter. It was necessary for Lord Selborne to decide the last point having regard to the fact that the High Court of Calcutta had held in the above case that the Indian Legislature being in the position of an agent of the British Parliament could not delegate its legislative functions to a third person.

Having plenary powers of legislation, the Indian Legislature can legislate either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its

legislation into effect, as also the area over which it is to extend.

We have seen that the Courts of Law are competent to inquire into the question of the validity of the Acts of the Indian Legislature. Suppose it decides any such Act to be invalid, being beyond its powers. What is the position? The judges are entitled to refuse to give effect to the Act or any of the provisions of the Act as being *ultra vires*.

Having discussed the nature of the legislative powers of the Indian Legislature, let us now pass on to the restrictions that have been imposed on it. Section 22 of the Indian Councils Act 1861, as we have seen, has imposed several restrictions on the capacity of the Indian Legislative by a number of provisos one of which is as follows :

“The Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any provisions of any Act passed in this present session of Parliament.....in any wise affecting Her Majesty’s Indian territories or the inhabitants thereof.”

Reliance has been placed on this proviso for the contention that the Indian Legislative cannot pass any Act affecting the High Courts on the ground that it would affect the provisions of the Indian High Courts Act of 1861, being an Act passed in the same session of the Parlia-

ment as the Indian Councils Act, 1861. It has been held however that having regard to section 9 of the Indian High Courts Act of 1861, as also to certain clauses in the Letters Patents establishing the several High Courts, the Indian Legislature is competent to affect or alter their jurisdiction. In this connexion, Lord Selbourne observed as follows in the case already mentioned (*R. v. Burrah*): "The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council purporting to exclude the jurisdiction of the High Court within the particular districts is inconsistent with any of the provisions of 24 & 25 Vict. C. 104? Now it appears to their Lordships from the express terms of the Act 24 & 25 Vict. C. 104, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established), the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to and not to be exclusive of, the general legislative power of the Governor-General in Council..... Lastly, by Letters Patent of the 28th December 1865 (cl. 44), it is "ordained and declared that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

The question was again raised in *Thornton*

v. *Thornton* (b). In that case, the petitioner, a European British subject resident at Secunderabad (Deccan), sued for a divorce alleging against the respondent various acts of adultery committed at Secunderabad.

The question arose whether sec. 2 of the Indian Divorce Act (IV of 1861) was *ultra vires* and, as such, incompetent to confer jurisdiction on the Bombay High Court to try the suit under the provisions of that Act.

Sec. 2 is as follows:

"This Act shall extend to the whole of British India and (as far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in alliance with Her Majesty."

It was contended in this case that in as much as the Governor-General in Council is authorised under sec. 3 of the Indian High Courts Act (28 & 29 Vict. c. 15) to confer jurisdiction on High Courts, in regard to British subjects resident within the dominions of Native States by an executive act, he was not competent to do so by legislation and that therefore sec. 2 of the Indian Divorce Act was *ultra vires*. Scott, J., in deciding against this contention held that the Indian Legislature is competent to alter the jurisdiction of the High

(b) I. L. R. 10 Bom. 422. See also *R. v. Meares*, 14 B. L. R. 106. In the matter of the petition of Feda Hossein, I. L. R. 1 Cal. 431.

Courts and that this general power was not taken away by the fact that a special power of altering the limits of jurisdiction by an executive order had been conferred by 28 & 29 Vict. c. 15, sec. 3.

We now pass on to another restriction *viz*, "The Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of the Government of India Act, 1858." Section 65 of the latter Act lays down that all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State for India as they could have done against the Company.

The question arose in the recent case of *Secretary of State for India v. Moment* (c), whether Sec. 41 Cl. (b), of the Lower Burma Towns & Villages Act (Burma Act No. IV of 1898) was *ultra vires* and inoperative, having regard to the restriction mentioned.

It was contended on behalf of the Secretary of State before their Lordships in the Privy Council that Sec. 65 of the Government of India Act, 1858, was not intended to place a fetter on Indian Legislatures and that they were competent to vary the rights which

(c) 17 C. W. N. p. 169. Sec. 41 Cl. (b) is as follows :—

"No civil courts shall have jurisdiction to determine any claim to any right over land as against Government."

private individuals had against the East India Company. But it was held by their Lordships "that the effect of Sec. 65 of the Act, 1858, was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State for India in Council in a civil court in any case in which he could have similarly sued the East India Company"; and that the Governor-General in Council not having the power under the proviso to Sec. 22 of the Indian Councils Act of 1861 to repeal or in any way affect amongst other matters, any provision of the Government of India Act 1858, Sec. 41 (b) of Act IV of 1898 (Burma) which debars a civil court from entertaining any claim against the Government to any right over land was *ultra vires*, and of no effect.

There is one more rather important restriction which we shall notice before we leave this part of the subject and which is in the following proviso to sec. 22.

"The Governor-General in Council shall not have the power of making any laws or regulations which may affect the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland; whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the

Crown over any part of the said territories." This proviso has been the subject of judicial consideration in the well-known case of Amir Khan (6 B. L. R. 392). In that case, Amir Khan was arrested and imprisoned under Regulation III of 1818. Amir Khan applied for a writ of Habeas Corpus, on, among other grounds, *viz.*, that Regulation III of 1818 which takes away the liberty of the subject and deprives him of the elementary right of being heard in a Court of Law is *ultra vires*, in as much as it affects part of the unwritten law and the constitution whereon allegiance of the subject depends. It was argued that the allegiance of a subject could be demanded only on the ground that the Crown afforded protection and that therefore any Act of the Legislature which deprived the subject of protection affected the allegiance of the subject to the Crown. Markby J. in overruling this contention observed as follows :—"The allegiance of a British subject in no way whatever depends on the existence or non-existence of such a power as conferred by the Regulation of 1818. I wholly repudiate the doctrine contended for that the allegiance can by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege or immunity whatever."

"Besides the formal power of making laws through the Legislative Council, the

Governor-General in Council under an Act of 1870 has power to legislate in a more summary manner by means of regulations for the government of certain districts of India of a more backward character..... Under a section of the Act of 1861 the Governor-General has also power, in cases of emergency to make temporary ordinances which are to be in force for a term not exceeding six months" (*The Government of India* by Ilbert p. 145, 3rd edition) (d).

An interesting question has been raised in the courts of this country *viz.* whether the Indian Legislature is competent to legislate for offences committed on the high seas. In *R. v. Aloo Paroo(e)*, Sir H. Roper observed that "when the legislature of Great Britain proposed to itself to delegate legislative powers with regard to India and the courts therein to the legislative council of India, it is reasonable to suppose that it was intended to relegate to such legislative council power to prescribe the law to be administered as well with respect to offences committed on the high seas and prosecuted in India as with respect to offences committed on the Indian soil." This view was

(d) This point was taken in a later case, *Alter Kaufman v. The Government of Bombay*, I. L. R. 18 Bom. 636, and overruled. See *The Government of India Act 1870* and *The Indian Council Act 1861*, Sec. 23.

(e) *Perry's Or. Ca.* 551.

questioned in a Bombay case (f), if not definitely overruled. The point again came up for consideration in *R. v. Kastyia Rama*(g). West, J., inclined to the view that the Governor-General in Council has no power to legislate for offences committed on the high seas beyond the territorial limits.

There is no doubt that the Indian Legislature is competent to legislate with reference to the territorial waters. It can also legislate with reference to British Indians on the high seas beyond the territorial waters(h). The question is, has it got a power to legislate generally with reference to the high seas? Having regard to the fact that the Indian Legislature is a non-sovereign body and to the theory of international law that territorial sovereignty does not extend beyond the territorial limits, it may be laid down that the authority of the Indian Legislature does not extend beyond the territorial waters. It should be noticed however that by the Indian Marine Service Act 1884, sec. 2.(47 & 48 Vict. c. 38) the Indian Legislature has been specially empowered to make laws for all persons employed or serving in, or belonging to the Indian Marine Service, provided that a law made under the section shall not apply to any offence, unless the vessel

(f) *R. v. Elmstone* 7 Bom. H. C. R. (Crown Cases) p. 89.

(g) 8 Bom. H. C. R. (Crown Cases) p. 63.

(h) See Sec. 22 of 24 and 25 Vict. C. 67.

to which the offender belongs is at the time of the commission of the offence within the limits of the Indian waters as defined by the Act.

Sec. 3 of the Act defines the expression "Indian waters" so as to include the high seas between the Cape of Good Hope on the west and the straits of Magellan on the east and all territorial waters between these limits. Then under this Act the Indian Legislature is specially authorized to legislate for offences committed on certain parts of the high seas by persons employed in the Indian Marine Service.

We now turn to the powers of the Government of India in their executive capacity. A detailed examination of these powers would be outside the scope of this work. We shall confine ourselves to the consideration of the extraordinary powers that have been conferred on the Government by legislation. It is one of the principles of English law that nobody's property or liberty should be in jeopardy except under the sentence of a competent court of law. This is also the guiding principle of British administration in this country. But certain exceptional powers have been conferred on the Indian executive which authorise it summarily to arrest and imprison individuals, as also to confiscate their property without giving them any opportunity to be heard in a court of law. Bengal

Regulation III of 1818 enables the Governor-General in Council to arrest and imprison any person under a warrant issued under the Regulation. A person so arrested and imprisoned has no remedy in a court of law, a warrant of commitment being a sufficient authority for the detention of the person in any fortress, jail etc. Even if the warrant was issued after the arrest, that would not justify a court of law in questioning the legality of the detention under the Regulation (i).

It was contended in the case of Amir Khan already cited that Regulation III of 1818 contemplated alien political prisoners and did not extend to natural-born subjects of Her Majesty. This contention was overruled by Markby, J., who observed as follows:—"I think the power of arrest and imprisonment is given quite generally and the Governor-General in Council is made the sole judge of the necessity of using it."

A similar power has been conferred on Government with reference to the arrest and detention of foreigners in this country. Act III of 1864 gives power to the Government of India as also to the Local Governments to order any foreigner to remove himself from British India, and in default to arrest and imprison him,

(i) *In the matter of Amir Khan* 6 B. L. R. 392.

upon such terms and conditions as the Government may deem sufficient for the peace and security of British India and of the allies of His Majesty and of the neighbouring Princes and States.

In the case of *Alter Caufman v. Government of Bombay* (j), where the Government under the above Act, had ordered Caufman and two others, all foreigners, to remove themselves from British India and had them, on their default, arrested and imprisoned, it was argued on behalf of the prisoners that the imprisonment was illegal, in as much as Act III of 1864 was intended to be applied to assure peace and security, and that the arrest of the prisoners, being not for that purpose, was illegal. Sterling, J., in overruling this contention observed that the Act gave the fullest power to the Government to order any foreigner to remove himself from India, that the Government was the sole judge of what was necessary for the peace and security of British India and that if it acted according to the letter of the Act, the courts could not enquire into the sufficiency of its reasons for so acting.

In exercising such extraordinary powers mentioned above, the executive should act in accordance with the provisions of the Act which gives them the power. First, it should

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not go beyond the Act ; and secondly, if any procedure has been laid down for the exercise of the powers given by the Act, it should scrupulously comply with the same. Failure to observe either of these principles will justify a court of law to set aside anything done under the Act, as being *ultra vires* and illegal. The first principle is illustrated by the case last cited and the second by a recent case *viz :—In the matter of Rudolph Stallmann (k)*.

In the former case, the arrest and imprisonment of Kaufman and two others were declared illegal by reason of the direction contained in the warrant that the persons named therein should remove themselves by sea to the places mentioned therein, it being held that such direction was *ultra vires* and illegal. Bailey, J., was of opinion that the Government of India could not legislate with reference to the high seas and that therefore the Government of Bombay had exceeded its power given under the Act in directing the prisoners to remove themselves by sea to places outside British India.

In the case of Stallmann, a German foreigner, who was arrested for extradition under a warrant of the Government of India issued under the Indian Extradition Act (XV of 1903) it was held that the Government can

only issue a warrant by virtue of the provisions of the legislature authorising it, and that if those provisions have not been carried out, the warrant and the custody thereunder may be pronounced illegal under Sec. 491 of the Criminal Procedure Code, though with the extradition proceedings themselves, the High Court, except as allowed by the Act, cannot directly interfere.

Under Sec. 3 of the Extradition Act the Magistrate who holds the enquiry should take evidence for, as also against, a foreign criminal. In this case, Stallmann asked for an adjournment of the inquiry with a view to procuring evidence in his behalf. The Magistrate refused to adjourn and to give him a reasonable opportunity of adducing evidence. It was accordingly held that proper opportunity for defence as provided by the Act had not been given by the Magistrate and that the inquiry was not therefore according to law, and the extradition warrant issued on such proceeding was invalid and did not justify detention under it. The warrant was accordingly set aside and the petitioner set at liberty.

It should be noticed however that the jurisdiction of the Courts of Law in this country to examine the legality of the acts of the executive may be taken away by law, and if that has been done in any case, the Courts are absolutely powerless to interfere,

even if it be found that the act in question is not in conformity with the provisions of law. This has been made clear in the recent case of Mahomed Ali (1). In that case the Government of Bengal acting under the Indian Press Act (I of 1910) seized a copy of a pamphlet belonging to Mahomed Ali and entitled "Come over into Macedonia and help us," the said pamphlet having been previously declared to be forfeited to His Majesty by a notification issued by the Government of Bengal under the Indian Press Act. It was contended, *inter alia*, on behalf of the petitioner that the forfeiture and the seizure were bad in law, in as much as the notification declaring the forfeiture did not comply with the provisions of the Act. His Lordship the Chief Justice in overruling this contention observed as follows :—"The notification therefore appears to me to be defective in a material particular, and, but for Section 22 of the Act, it would (in my opinion) be our duty to hold that there had been no legal forfeiture."

"That section, however, provides that every declaration purporting to be made under the Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place. The result is, that though I hold the notification does not comply with the provisions of the Act, still we are (in my

(1) 18 C. W. N. p. 1.

opinion) barred from questioning the legality of the forfeiture it purports to declare (m).

In addition to statutory powers, "the Governor-General in Council enjoys.....such of the powers, prerogatives, privileges, and immunities appertaining to the Crown as are appropriate to the case and consistent with the system of law in force in India. Thus it has been decided that the rule that the Crown is not bound by a statute unless expressly named therein applies also to India. •See *Secretary of State for India in Council v. Bombay Landing & Shipping Company*, 5 Bom. H. C. Rep. O. C. J. 23; *Ganpat Pataya v. Collector of Canara*, I. L. R. 1 Bom. 7; *The Secretary of State for India v. Matthurabhai*, I. L. R. 14 Bom. 213 218; *Bell v. Municipal Commissioners for Madras*, I. L. R. 25 Mad. 457. The Governor-General in Council has also, by delegation, powers of making treaties and arrangements with Asiatic States, of exercising jurisdiction and other powers in foreign territory and of acquiring and ceding territory. See *Damodhar Khan v. Deoram-Khanji*, I. L. R. 1 Bom. 367, L. R. 2 App. Cas. 332; *Lachmi Narain v. Raja Pratab Singh*, I. L. R., 2 All. 1; *Hemchand Devchand v. Azam Sakarlal Chhotamlal*, and *The Taluka of Kotda Sangani v. The State of Gondal*, (1906) A. C. 212 and below, p. 417. Moreover the Government of India has

(m) 18 C. W. N. 1 at 14,

powers, rights, and privileges derived not from the English Crown but from the Native Princes, whose rule it has superseded" (n).

Among the non-statutory powers which the Government of India enjoys, as representing the Crown, which is the sovereign power in this country, is the power to commit what are known as "acts of State," for which it is not answerable to any court of law. The latter is competent to determine whether an act purporting to be an "act of State" is in fact such an act. But once it is determined that it is an act of State, it can offer no redress to an aggrieved party. A number of cases has been decided on this point, the most important of which are given in the footnote (o).

What is the position of the Crown in India as regards its liability to be sued in a court of law? "It may be stated," says Anson, "as a general rule, that no action can be brought against a sovereign in person." In England when a subject has a cause of action, legal or

(n) *The Government of India* by Ilbert p. 203 (3rd Edn.)

(o) *Nabob of Carnatic v. The East India Company*, (1793) 1 Ves. Jr. 371; 2 Ves. Jr. 56; 3 Bro. C. C. 292; 4 Bro. C. C. 180. *The East India Company v. Syed Ally*, (1827) 7 M. I. A. 555. *Heerachand Bedrechand v. Elphinstone*, 2 State Trials N. S. p. 379. *Secretary of State for India in Council v. Kama-chee Boye Sahaba*, (1859) 13 Moo. P. C. 22. *The Ex-Raja of Coorg v. The East India Company*, (1860) 29 Beav. 300. *Raja Salig Ram v. Secretary of State for India in Council*, (1872) L. R. Ind. App. Supp. Vol. p. 119. See also *Forester & others v. Secretary of State for India in Council* (1872) L. R. I. A. Supp. Vol. p. 10.

equitable, against the Crown, he cannot proceed by suit, but has to adopt a special procedure called the Petition of Right. Even this procedure is available to the subject in certain cases but not in all (*p*).

In India also, no suit or action lies against the Crown. But one having a claim against the Crown is not without remedy in a court of law. By Statute 21 & 22 Vict. C. 106 sec. 2, the territories and revenues of India were transferred from the East India Company to the Crown. In order, however, that no one should be deprived of any right or claim which he might have had against the Company, sec. 65 of the Statute provided that the Secretary of State in Council as a body corporate might be sued in all cases in which the Company might have been sued. It was further provided by sec. 68, that "neither the Secretary of State ~~nor~~ any member of the Council shall be personally liable in respect of any contract, covenant or engagement of the said Company as aforesaid, or in respect of any contract entered into under the authority of this Act, or other liability of the said Secretary of State or Secretary of State in Council in their official capacity; but all such liabilities, and all costs and damages in respect thereof, shall be satisfied and paid out of the revenues of India."

(*p*) **Feather v. The Queen*, 6 B. & S. 257 at 293, per Cockburn, C. J.

The position then is this that the Secretary of State in Council is liable to be sued in all cases in which suits might have lain against the East India Company. To determine therefore under what circumstances a suit may lie against the Secretary of State in Council, we have first of all to find out the circumstances under which the Company was liable to be sued.

The position of the East India Company was of an anomalous character. They started as a trading corporation, but in course of time they came to acquire extensive territories and assumed the function of a sovereign power in those territories. Parliament by legislation allowed them to remain in possession of the territories acquired by them as also to exercise the functions of government therein, subject however "to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same" (53 Geo. III c. 155). Thus the Company came to be invested with powers and privileges of a two-fold character, namely, power to carry on trade as merchants, and (subject only to the prerogative of the Crown to be exercised by the Board of Commissioners for the Affairs of India) power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land and to make peace or war with the natives of India. It has been held in a

large number of cases that the Company was subject to the jurisdiction of municipal courts in all matters and proceedings undertaken by them as a private trading company (*q*). But that they were not so subject in matters and proceedings undertaken by them in their character of territorial sovereign (*r*). No doubt on account of the two-fold capacity of the Company, it was extremely difficult to ascertain whether any particular act was to be attributed to the exercise of their sovereign power or to their functions as a trading corporation. Once however it was established that the act complained of belonged to the former category, no court was entitled to question its propriety.

This being the position of the East India Company, it follows that the Secretary of State for India in Council is liable to be sued only in respect of those acts done in the conduct of undertakings which might be carried on by private individuals without sovereign power, but not in respect of acts which can only be done by sovereign authority. This principle was laid down in the well-known case of *P. &*

(*q*) *Moodalay v. The East India Company*, 1 Bro. C. C. 469.

(*r*) *Gibson v. The East India Company*, 5 Bing. (N. S.) 262. *The Ex-Raja of Coorg v. The East India Company*, 29 Beav. 300.

O. Co. v. Secretary of State (s), and has since been followed in a number of cases (t).

What is the position of the servants of the Government in this country? The English law on the point is quite clear. In *Dunn v. The Queen*, it was laid down "that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices during the pleasure of the Crown." This means that they can be dismissed, suspended or retired at the pleasure of the Crown and that no municipal court will question the propriety of the measure. The courts in England have gone so far as to say that the Crown has an inherent power to dismiss any of its servants, unless it has been taken away in any particular case by Parliament and "that if any authority representing the Crown were to exclude such a power by stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown" (u).

In India there are certain officials who hold their office during the pleasure of the Crown e.g., judges of the several High Courts, members of the Civil Service. What about the rest?

(s) 5 Bom. H. C. R. Appendix A ; Bourke 166. (A. O. C. J.)

(t) *Nobin Chandra De v. Secretary of State for India*, I. L. R. 1 Cal. 11. *Jehangir M. Cursetji v. Secretary of State for India in Council*, I. L. R. 27 Bom 189 *Shivabhanjan v. Secretary of State for India*, I. L. R. 28 Bom. 314.

(u) *Dunn v. The Queen* (1896) 1 Q. B. p. 116 at 118.

The question was discussed in *Jehangir v. Secretary of State* (v). There the learned Judge after going through all the authorities appears to hold that those public servants who are charged with functions which are in themselves the acts or attributes of sovereignty hold their office during the pleasure of the Government, but that those who are not so charged hold their office in terms of the contract entered into by them with the Government (per Tyabji, J., 213).

The power to dismiss servants at pleasure includes the power to retire them; as also to suspend them at pleasure (w).

A public servant who has been dismissed is not entitled to sue for a declaration that there were no good grounds for dismissing him, nor for a declaration that his dismissal was in contravention of rules framed by Government, nor for a declaration that his dismissal should have been notified (x).

(v) I. L. R. 27 Bom. 189.

(w) *Grant v. Secretary of State for India* L. R. 2 C. P. D. 445. See also *Voss v. Secretary of State for India*, I. L. R. 33 Cal. 669. *Sarat Chandra Das v. Secretary of State*, I. L. R. 38 Cal. 378.

(x) *Ram Das Hara v. Secretary of State* 13 C. W. N. p. 106.

LECTURE IV.

The Local Governments and The Local Legislative Councils.

Having dealt with the Government of India and its powers, we shall now proceed to deal with those subordinate governing bodies which are known as Local Governments. Three of the existing Local Governments are much older than the Supreme Government. The central authority which exists to-day did not come into existence till 1773. Before that date, the Presidencies of Bengal, Madras and Bombay, were independent of one another, each being governed by its own Governor and Council and exercising absolute authority within its own limits. As the Company's territorial interests increased and as it became increasingly involved in incessant hostility with the neighbouring powers and princes, it was felt necessary to establish a central authority. By the Regulating Act of 1773, the Governor of Bengal was appointed to be also the Governor-General and he and his council were authorized to have power of controlling the government and management of the Presidencies of Madras and Bombay so far and in so much, that it shall not be lawful for any President and Council of Madras, Bombay" to

II.4 THE LOCAL GOVTS. & LEGISLATIVE COUNCILS.

make war or treaties without the consent of the Governor-General except in cases of imminent necessity or of special orders from the Company's authorities in England. Also the President and Council of Madras and Bombay were directed to pay due obedience to any orders they might receive from the Governor-General and Council. Pitt's Act of 1784 which aimed at bringing the Company's government more directly under the supervision of the cabinet, while vesting the appointment of the Governor-General and the Governors in the Court of Directors, authorised the Crown to remove them from office. By this Act, the control of the Bengal Presidency over the other presidencies was further enlarged and declared to extend "to all such points as relate to any transactions with the country powers, or to war or peace, or to the application of the revenues or forces of such Presidencies in time of war." The net outcome of these enactments was that in matters relating to external or foreign policy, the minor presidencies were made subordinate to the Governor-General and his Council. But it does not appear that in matters of internal administration of the territories under them, they were, in any great measure, interfered with or controlled by, the latter. The Governors and their respective councils exercised their executive and legislative powers by the authority of the Royal Charters and Parliamentary

enactments; and it was not till 1833 that they were deprived of their legislative functions and reduced to the position of mere executive media or agents for carrying out the will of the Government of India. This brings us to the history of the Local Legislatures and their relation to the Supreme Legislature.

History of
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Legislature.

The Regulating Act of 1773, while investing the Governor-General and his Council with the power of exercising control and superintendence over the whole of British India, did not give them correspondingly large legislative powers. On the contrary it authorised them to make laws for a very small portion of British Indian territories viz, the Company's settlement at Fort William and factories and places subordinate to it. And even this small measure of legislative power was greatly curtailed by the provision that the laws and regulations of the Governor-General and Council were not to be valid, till they had been registered and published in the Supreme Court with its approval. This made the legislative powers of the Governor-General and Council dependent on the Supreme Court and caused much friction between the two bodies. By an amending Act passed in 1781, the Governor-General and Council were authorized to frame from time to time regulations for the provincial courts which were under their protection. The regulations were liable to be disallowed

by the Crown but not by the Supreme Court at Calcutta. A large number of regulations was passed under the authority of this Act. During the time of Lord Cornwallis, a regulation provided for forming them into a code. In 1797, Parliament recognised and confirmed the legislative authority of the Governor-General and Council, independent of the Supreme Court and directed the provincial courts to pay due obedience to the regulations passed by them. Ten years later, the Governors and Councils at Madras and Bombay were authorized to make regulations, but says Mr. Ilbert, "subject to approval and registration by the Supreme Court and Recorder's Court" respectively.

The Charter Act of 1813 extended the legislative powers of the Councils which were authorized to impose duties and taxes, with the sanction of the Court of Directors and Board of Control, within the Presidency towns and also to make regulations for enforcing the same.

From the above, it is clear that the control and supervision of the Governor-General and Council over the Presidencies of Madras and Bombay were limited to matters relating to peace and war, the latter being left to exercise their executive and legislative functions within their respective territories, independent of all control. But this independence did not last for long. "In 1833," as Mr. Cowell points out, "the attention of Parliament was directed to three

leading vices in the frame of Indian Government. The first was in the nature of the laws and regulations; the second was in the ill-defined authority and power from which the various laws and regulations emanated; and the third was the anomalous and sometimes conflicting judicatures by which the laws were administered" (a). To remedy these defects, Parliament enacted a drastic measure by which legislative power was taken away from the Presidencies of Madras and Bombay and solely and exclusively vested in the Governor-General and Council. The Governors and Councils of the minor presidencies were authorised to submit to the central authority drafts or projects of any laws and regulations which they wanted. This system was in force till 1861 when a return was made to the old system.

In the meantime, the presidencies were gradually increasing in size by new conquests and cessions from the territories of the neighbouring princes and powers. The Bengal Presidency which originally included the provinces of Bengal, Bihar and Orissa had by this time extended its boundaries far beyond its original limits. The Act of 1833 provided for its division into two separate presidencies. But the Act of 1835 suspended the provision for division

(a) Cowell's Courts and Legislative Authorities in India
p. 68 (5th edn)

and authorized the creation of a new Lieutenant-Governorship for the North West Provinces. The first Lieutenant-Governor for the North West Provinces was appointed in 1836.

Up to this time, it should be noticed that the Governor-General and Council, while exercising the supreme power of control and management of the Company's possessions in India, continued to be directly responsible for the government of Bengal. This arrangement was sought to be set aside by the Charter Act of 1853 which,

- (1) empowered the Court of Directors "to declare that the Governor-General of India shall not be the Governor of the Presidency of Fort William in Bengal, but that a separate Governor shall be appointed for such a Presidency;" and
- (2) further provided that "unless and until a separate Governor shall be constituted as aforesaid," the Court of Directors might authorize the Governor-General to appoint a Lieutenant-Governor for Bengal.

The power of appointing a Governor for Bengal was not exercised, till 1912, but a Lieutenant-Governor was appointed for Bengal in 1854. This Act further authorized the creation of a new presidency on the same lines as Madras and Bombay, and until and unless such new presidency be constituted, authorized the creation of a new Lieutenant-Governorship by the

Governor-General. Under the authority of this Act, the territories of the Punjab were made into a Lieutenant-Governorship in 1859.

The Act of 1853 made provisions for the creation of new presidencies and of new Lieutenant-Governorships, if the new presidencies were not constituted. The Act of 1854 made provisions for what are known as "Chief Commissionerships." "Under the old system," says Mr. Ilbert, "the only mode of providing for the government of newly acquired territory was by annexing it to one of the three Presidencies. Under this system of annexations, Bengal had grown to unwieldy dimensions. Some provision had been made for the relief of its government by the constitution of a Lieutenant-Governorship for the North West Provinces in 1836. The Act of 1853 had provided for the constitution of a second Lieutenant-Governorship, and if necessary, of a fourth presidency. These powers were however not found sufficient and it was necessary to provide for the administration of territories which it might not be advisable to include in any presidency or Lieutenant-Governorship" (b).

Accordingly in 1854, Parliament passed an Act authorising the Governor-General in Council, with the sanction and approbation of the Court of Directors and Board of Control,

(b) Ilbert Government of India p. 93 (3rd edition.)

and under their control and direction, from time to time by proclamation to take under his immediate authority any part or parts of British Indian territories and provide for their administration. Under powers given by this Act, the Governor-General in Council established Chief Commissionerships for Assam, the Central Provinces, Oudh and Burma. Provinces under Chief Commissioners are technically under the immediate authority and management of the Governor-General in Council, though by the Indian General Clauses Act (Act X of 1897) sec. 3, sub-sec. 29, a Chief Commissionership is a Local Government. The title of Chief Commissionership was formally recognised by Parliament by an Act of 1890 (33 and 34 Vict. c. 3, sec. 1 and 3).

The Act authorising the establishment of Chief Commissionerships also authorized the Governor-General in Council with the sanction of the Court of Directors and Board of Control to declare and limit the extent and authority of Local Governments; and also directed that "the Governor-General of India shall no longer be the Governor of the said Presidency of Fort William in Bengal."

Thus by the middle of the last century, the distinction between the Government of India and the various Local Governments was made absolute. For a little over 150 years, the Company's possessions in different

parts of India remained isolated units. Then came the Act of 1773 which made one of the units viz.—Bengal, supreme over the others. And lastly, by the Acts of 1853 and 1854, the supremacy of Bengal over the other presidencies was wholly taken away and the several Local Governments were all reduced to subordination to one supreme authority styled “The Governor-General of India in Council.”

We shall now resume our sketch of the history of the Local Legislatures. We saw that by the Act of 1833, the Local Governments were deprived of their legislative powers. By the Charter Act of 1853, they were directed each to send a member to the Supreme Legislative Council. It was thought that the presence of members from the different provinces would add to the knowledge and information of the council and render legislation more in accordance with local conditions and requirements than it would otherwise be. But although this was an improvement on the system antecedent to 1854, it was not enough. Lord Canning, in a despatch dated the 9th December 1859, expressed the opinion that by giving them (the provinces) a much larger share in it (legislation), useful local measures, may be facilitated and expedited, without leading to any interference with measures of a general character or with the authority and responsibility of the Governor-General in

Council." We saw in the last lecture that the resumption by the Crown of its Indian territories by the Act of 1858 was followed by a reconstitution of the Council of the Governor-General under the Act of 1861. The same Act also brought about an expansion of the system of local legislation which existed prior to 1833. Madras and Bombay got back their old legislative powers and the Government of India was authorized to establish legislative councils in Bengal, North West Provinces and the Punjab, as well as to create new Lieutenant-Governorships with legislative councils (c). A legislative council was established in Bengal in 1863, in the North West Provinces in 1866, and in the Punjab and Burma in 1897. In 1905, Bengal was broken up into two separate provinces known as Bengal and Eastern Bengal and Assam. A legislative council was given to the latter, the former retaining its old legislative council (d).

Having followed the history of the Local Governments and Legislatures, we are now in a position to enter into a discussion of their powers. And first, a word as to the meaning of

(c) 24 and 25 Vict. c. 67, secs. 29 to 43; sec. 44 and sec. 46.

(d) In 1912 there was again a readjustment. Bengal and Eastern Bengal were again amalgamated under a Governor with an enlarged council and Behar was constituted a separate province under a Lieutenant-Governor with a legislative council.

the expressions: local government and local legislature. Sec. 6, of the Indian Councils Act, 1892 (e), enacts that "in this Act, the expression local legislature means :—

Definition
of the Ex-
pression
'Local Go-
vernment.'

(1) The Governor in Council for the purpose of making laws and regulations for the respective Provinces of Fort St. George and Bombay; and

(2) the Council for the purpose of making laws and regulations of the Lieutenant-Governor of any province to which the provisions of the Indian Councils Act, 1861, touching the making of laws or regulations have been or are hereafter extended or made applicable."

The above meaning is strictly applicable to the term, 'local legislature' used in the Act of 1892, but it is submitted that it is also the generally recognised meaning which the courts will act upon.

The other expression, 'local government' is defined in Indian General Clauses Act (Act X of 1897, sec. 3) as meaning "the person authorized by law to administer executive government in the part of British India in which the Act or Regulation containing the expression operates, and includes a Chief Commissioner." In common parlance, however, a local government is not only an executive.

but also a legislative body. Thus we often speak of the Acts of a local government and even the courts sometimes use the expression in this extended sense.

Powers
of Local Le-
gislatures.

Following our method of treatment in the last lecture, we shall first discuss the powers of the Local Legislatures. These have been given by the various Indian Councils Acts. The first and foremost of these Acts is the Act of 1861^(f), which, while reconstituting the Indian Legislature, laid down provisions for the establishment of local legislatures and defined their constitution. Sec. 34 of the Act enacted that the power of making laws and regulations thereby vested in the local governments should be exercised only at meetings of the council held for the purpose of making laws and regulations at which additional members (*i. e.* members nominated or elected for legislative purposes only) are present.

Sec. 34 creates the Local Legislature as distinguished from the Local Government. And now about its powers. Sec. 42 of the Act invests the local legislatures with the power of making laws and regulations for the peace and good government of the province under it, and for that purpose to repeal or amend any laws and regulations made, prior to the coming into operation of the Act of 1861,* by any

(f) 24 and 25 Vict. c. 67.

authority in India, affecting the province under it.

Wide as the powers of the local legislatures are, they have been made subject to certain restrictions :—

1. It is subject to all the restrictions which have been placed on the powers of the Supreme Legislative Council and which we have already noticed.
2. It is subject to certain other restrictions: it cannot, except with the previous sanction of the Government of India, make regulations or take into consideration any law or regulation for the following purposes :
 - (a) affecting the public debt of India or the customs, duties or any other tax or duty now in force and imposed by the authority of the Government of India for the general purposes of such Government ;
 - (b) regulating any of the current coin, or the issue of any bills, notes or other paper currency ;
 - (c) regulating the conveyance of letters by the Post Office or messages by the Electric Telegraph within the Presidency ;
 - (d) altering in any way the Penal Code of India, as established by Act of the Governor-General in Council ;

Restrictions on the powers of the Local Legislatures

- (e) affecting the religion or religious rights and usages of any class of his Majesty's subjects in India ;
- (f) affecting the discipline or maintenance of any part of His Majesty's military or naval forces ;
- (g) regulating patents or copy-rights ;
- (h) affecting the relations of the Government with foreign princes or states (g).

Suppose however that a local legislature passes a law touching any of the above-mentioned purposes. What is the effect ? It has been provided that "no law or provision which shall have been made by any such Governor in Council and assented to by the Governor-General.....shall be deemed invalid only by reason of its relating to any of the purposes comprised in the above list" (h).

The net result of this restrictive provision amounts to this that the local legislatures should not without the previous sanction of the Government of India legislate about matters comprised in the above list ; and I believe, they may be lawfully restrained by the Government of India if they attempt to do so. If however they pass any such measure and secure the assent of the Supreme Government to it, the Courts would have to give effect to it,

(g) 24 and 25 Vict. c. 67, sec. 43.

(h) 24 and 25 Vict. c. 67, sec. 43.

and will not be allowed to rule it *ultra vires*, and therefore invalid.

3. Among the restrictions imposed on the powers of the Indian legislature is one which precludes it from making any laws or regulations repealing or affecting any Acts of Parliament specifically mentioned in sec. 22 of the Indian Councils Act, 1861. The natural inference is that the Supreme Legislature is entitled to repeal or amend Acts of Parliament, not so mentioned. But the local legislatures are absolutely precluded by a proviso in sec. 42 of the above mentioned Act from "making any laws and regulations which shall in any way affect any of the provisions of this Act (Act of 1861) or of any other Act of Parliament in force or hereafter to be in force in such Presidency."

We noticed in the last lecture that a law or regulation of the Indian legislature is subject to disallowance of the Crown. But till such disallowance be signified, the law is valid and binding. The assent of the Crown or any other authority is not necessary to give validity to any law or regulation of the Indian legislature. It is not so with the local legislatures. Section 40 of the Act of 1861 enacts

Local
Legislative
dependent
on the Gov-
ernment of
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tial to the
validity of
the laws of
Local Legis-
lature may
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ed,

that no law or regulation of the local legislatures shall have any validity till the Governor-General shall have assented to it and the assent shall have been signified to the local government and published by it.

Indian
Councils
Act, 1892
Sec. 5.

Subsequent legislation has extended the powers of local legislatures. By Section 42 of the Act of 1861, as has been already noticed, they obtained the power of repealing or amending any law or regulation, made by any Indian authority, affecting the provinces under them, *prior to the coming into operation of the Act of 1861*. Obviously, this will not empower the local legislatures to repeal or amend any law or regulation passed by the Supreme Legislature *after 1861*. This power has now been given by section 5 of the Indian Councils Act of 1892(i). The words of the section are as follows :—"The local legislature of any province in India may from time to time, by Acts passed under and subject to the provisions of the Indian Councils Act, 1861, and with the previous sanction of the Governor-General, but not otherwise, repeal or amend as to that province any law or regulation made either before or after the passing of this Act by any authority in India other than the local legislature : Provided that an Act or provision of an Act made by a local legislature and subsequently

(i) 55 and 56 Vict. c. 14.

assented to by the Governor-General.....shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this section."

Under the powers given by this Act, the Legislature of Bombay passed in 1898 the Bombay Improvement Act (j). Quite recently, the Legislature of Bengal has passed the Calcutta Improvement Act under the same powers. In a case which arose under the former Act, "the powers" given by the Act of 1892 (section 5) to local legislatures were considered. It was contended by the plaintiff that the use of the expression "*as to that province*" in the section enabled the local legislature to repeal or amend any law of the Indian Legislature so as to affect the *whole* of that province but not any *particular locality* in it. The Court held "that the reference to the province is merely for the purpose of defining the limits of legislative operation and in no way imposes the condition that all legislation should affect the whole of that area" (k).

There is one more important point to be noticed while tracing the history of the powers local legislatures, *viz.*, their power to punish European, British, subjects. We have seen that a local legislature can not pass any measure

(j) Act IV of 1898 (Bombay).

(k) *Hari Pandurang and another v. The Secretary of State for India in Council*, etc., I. L. R., 27 Bom. p. 424

affecting any Act of Parliament. It would follow therefore that it cannot pass any law affecting or infringing the powers of the High Courts established by the Indian High Courts Act of 1861. In *R. v. Reay* (1), the Bombay High Court ruled that it had the exclusive jurisdiction to try offences committed by European British subjects with the exception of offences made punishable by 53 Geo. III c. 155, sec. 105 by Justices of the Peace and that therefore the Bombay District Police Act (VII of 1867) passed by the Government of Bombay was *ultra vires*, in so far as it conferred criminal jurisdiction on Magistrates in the mofussil over British-born subjects and thus interfered with the exclusive jurisdiction of High Courts over British-born subjects. This disability of the local legislatures has been partially taken away by the Indian Councils Act of 1871(m). Sec. 1 of the Act enacts that "no law or regulation made or hereafter to be made by any Governor or Lieutenant-Governor in Council in India in the manner prescribed by the aforesaid Act (Indian Councils Act, 1861) shall be invalid only by reason that it confers on magistrates, being Justices of the Peace, the same jurisdiction over European British subjects as such Governor or Lieutenant-Governor in

(1) 7 Bom. H. C. R., (Crown Cases), p. 6.

(m) 34 and 35 Vict. c. 34.

Council, by regulations made as aforesaid, could have lawfully conferred or could lawfully confer on magistrates in the exercise of authority over natives in the like cases."

The decision in *R. v. Reay* (n) leaves no doubt that local legislatures have no power to affect the jurisdiction of the High Court established under the Act of 1861 (o). From this it should not be inferred that any Act of the local legislature would be considered *ultra vires* merely because its effect would be to indirectly affect the jurisdiction of the High Court in respect of appeals from the courts in the mofussil which are under the protection of the local governments. Thus in *Premshunker Rughunathji v. Government of India* (p), it was held that the local legislature had the power of extending or restricting the powers of the civil courts which are its own creation, "even though the possible occasions for the exercise of the High Court's appellate jurisdiction may thus indirectly be increased or diminished in number." Similarly, in *Collector of Thana v. Bhaskar Mahadeb* (q) the court while admitting that "any Act of the local legislature which should propose to cut down this

(n) 7 Bom. H. C. R., p. 6, (Crown Cases).

(o) The Indian Legislature, as we saw in the last lecture, is competent to alter the powers or jurisdiction of the High Court.

(p) 8 Bom. H. C. R. (A. C. J.) 195.

(q) I L R 8 Bom. 254.

jurisdiction would so far be *ultra vires*," maintained that "legislation on the rights and obligations of the subjects by the Bombay Government in no way infringes on the authority of the High Court, unless the powers of the latter in dealing with the law when made, was in some way affected."

Not only are local legislatures incompetent to affect the jurisdiction of the High Courts, but of all other courts which were established by Acts of Parliament. Thus in *Aboo Sait v. Arnott* (r) and *Aboo Sait v. Dale* (s) the Madras High Court held that the enactments in sections 8 and 36 of Madras Act IV of 1865 which intended to do away with the jurisdiction of the Court of Requests established by Parliamentary Statute are inoperative.

Above we have discussed the question as to whether and how far local legislatures can curtail the jurisdiction of the High Courts. We now come to the question as to whether they can confer *new* jurisdiction on the High Courts, *i.e.*, to say, jurisdiction in matters not conferred by the Acts of Parliament and the Charters. The point was raised in the case of *Poorno Chunder Roy v. Kristo Chunder Singh* (t), but not decided. It was discussed in a subsequent case which arose under the Bombay

(r) 2 Mad. H. C. Rep. 439.

(s) 2 Mad. H. C. Re p. 439.

(t) 23 W. R. 171.

Improvement Act and which we have already noticed *viz.*, *Hari Pandurang and another v. The Secretary of State for India, etc.*, (u). The Bombay Improvement Act, 1898, set up a special tribunal for dealing with cases of land acquisition under the Land Acquisition Act 1894, for the purposes of the Bombay Improvement Act. By Sec. 48 (11) a limited right of appeal was allowed from the decisions of the Tribunal to the High Court. The question arose as to whether the local legislature was competent to give the High Court power to entertain the appeals. Jenkins, C. J., after having decided that the Tribunal was not a court subordinate to the High Court but a judicial body absolutely independent of it, said, "but if the Tribunal was not a court, what room was there to give the limited right of appeal to this court that section 48 (11) of the Improvement Act proposes to provide"?

"Apart from special jurisdiction in relation to particular matters derived from the authorised legislation of the Governor-General in Council the civil jurisdiction of the High Court is (1) ordinary original, (2) extraordinary original or (3) appellate and revisional. Now this limited right of appeal under the Improvement Act does not come within either of the last two heads of jurisdiction: the appellate and revisional jurisdiction can only come into play when there

(u) I. L. R., 27 Bom., 424.

has been a decision of a court—a condition which *ex hypothesi* does not exist here—while extraordinary civil jurisdiction obviously can have no application. Can it then be said that our ordinary civil jurisdiction is of any avail? I think not. The conditions are so widely different from those under which our original jurisdiction is exercised that, in my opinion they do not permit of our dealing with the case as falling within that jurisdiction.

“But if this be so, *the Improvement Act can not confer on us this jurisdiction, because the local legislature has no power to control or affect by their Acts the jurisdiction or procedure of the High Courts as that power rests with the Imperial Parliament and with the Legislative Council of the Governor-General.* (Sec. 24 and 25 Vic. c. 104)(v).

This decision of the Bombay High Court was taken note of by the Bengal Legislature in their Calcutta Improvement Act, 1911. That Act, like the Bombay Improvement Act, has made provisions for special tribunal for dealing with cases arising out of its operations, but it does not give any right of appeal to the High

(v) Many interesting points, touching the powers of local legislatures were raised in the argument in this case, *viz.*, (1) Can the local legislature create a corporation? (2) Can it create a court? These questions were not definitely answered. It was settled however that the local legislature is competent to create a tribunal independent of the supervision of the High Court

Court from the decisions of the Tribunal. That has been done by an Act of the Governor-General of India in Council.

There remains another point touching the power of the local legislatures which has not been definitely settled, viz., whether the local legislature can pass any law affecting the prerogative of the Crown. Mr. Ilbert holds that as the power of the Governor-General in Council to affect by legislation the prerogative of the Crown is expressly recognised by statute and as no such powers recognised in the case of the local legislatures, it may be inferred that the latter does not possess the power. This view has been rejected by the High Court of Madras in *Bell v. Municipality of Madras* (w), where both the judges held that "subject to the restrictions imposed by secs. 42 and 43 of the Act of 1861, a law passed by the legislature of this Presidency for its peace and good government is not invalid merely by reason only that it affects the prerogative of the Crown." The point was raised in *Hari Pandurang v. Secretary of State, etc.*, (x) but was left undecided. As there has been only one decision on the question which is a very difficult one, we do not venture to give any opinion.

The next subject of treatment is the nature and extent of the powers of local govern-

(w) I. L. R., 25 Mad. 457.

(x) I. L. R., 27 Bom. 424.

ments. These powers are mostly derived from statutes and in exercising the same, the local governments, as well as the Government of India, are required to adhere strictly to the provisions of the statute under which they profess to act. How strict the courts are in enforcing this principle may be seen from the cases we are going to cite.

In *Govardhan Singh and others v. Queen* (y) the accused were prosecuted under Sec. 76, Bengal Act II of 1882, for adding to an embankment within the "prohibited area" without having obtained the permission of the Collector as required by clause (6) of that section and fined. The High Court set aside the sentence on the ground that "no proclamation and general notice of the declaration under sec. 6 was published in the manner prescribed in sec. 60 of the Act." Here, to bring any part of the province under the "prohibited area," it was necessary to publish the general notice mentioned in sec. 6 of the Act in the manner prescribed in sec. 60. The Government had failed to do so. It was held accordingly that the accused could not be convicted under sec. 76 of the Bengal Act II of 1872.

Similarly, in *The Secretary of State in Council v. Nritya Gopal Audhikary* (z), as we have

(y) I. L. R., 11 Cal. 570.

(z) I. L. R. 28 Cal. 487.

seen already (a) certain acts of the officers of the local government were declared to be without legal authority because the notifications which professed to give them the requisite authority were not properly issued.

And again in *Vijaya Raghava v. Secretary of State in Council* (b), where a municipal commissioner was dismissed by the Governor in Council of Madras acting under sec. 9 of Act III of 1871 (Madras) on the ground of misconduct, the court held that the Governor in Council could not exercise his power of dismissal till the fact of misconduct or neglect is ascertained to have been committed and that the civil courts were not precluded from ascertaining whether there had been in fact any neglect or misconduct. In this case, the mere fact that the act complained of is done by the sovereign power and is not an act which could have been done by a private individual does not oust the jurisdiction of the court or render the act legal. The sovereign power claims to act under the sanction of municipal law and thus comes within the jurisdiction of the civil courts. Where, however, the jurisdiction of the municipal courts is expressly taken away by legislation, the act complained of cannot be impugned. Nevertheless it is always competent to the

(a) p. 43 *ante*.

(b) I. L. R., 7 Mad. 466.

court to inquire whether the act complained of is consistent with or within the powers given by the legislature or has satisfied all the formalities and conditions prior to their exercise of the powers. On this point, the well-known case of *Government v. Raj Kissen Singh* (c) is well worth our consideration. The facts of the case are as follows :

At the time of the permanent settlement, the northern boundary of the pergana of Susung (situated in Mymensingh at the foot of the Garo Hills) was not defined by Government. From before that time and certainly for more than sixty years, the zemindars of the pergana had exercised certain rights in the Garo Hills and over the inhabitants. Government held a survey, and declared the northern boundary of Susung to be a line running along the foot of the Garo Hills. The zemindar brought a suit to set aside the survey. The Government relied on Regulation X of 1822. Sec. 2 of the Regulation is as follows:—"The tract of country now comprised in the thanah jurisdiction of Goalpara, Dhoobrie and Kurreebari in the district of Rungpore is hereby declared separated from the said district and the operation of the rules of the police, civil and criminal justice, as well as those for the collection of revenue.....are suspended and shall cease to have effect therein."

(c) 8 W. R., 343 ; on app. 9 W. R. 426.

Sec. 8 places the tract separated by sec. 2 under a Commissioner, and the Governor-General in Council is declared competent to direct the separation of any tract of country occupied by the Garos from the estates of the neighbouring zemindars and to do certain other acts relating thereto, *e.g.*, to discontinue the collection by zemindars of any cesses, etc., to make arrangements either for the remission of the same or for their collection directly by the Government making compensation to the zemindars.

Clause 2 of sec. 8 enacts :—

“No suit shall be entertained by any civil court having jurisdiction or that may have hereafter jurisdiction within the tract of country subject to the authority of the Commissioner, on account of any act of the above description done under the authority of the Governor-General in Council.”

It was argued by the defendant in the above mentioned case that no civil court was competent to adjudicate upon the case. The High Court ruled to the contrary. The case was argued more than once in the High Court. Peacock, C. J., delivered the final judgment. The main points on the question of jurisdiction are summarised below :

(1) Regulation X of 1822 gives substantive power to the Governor-General in Council in respect of the tract of country described in

sec. 2 of the Regulation and "we can hardly suppose that the legislature intended by a proviso upon an enactment, limited to that tract of country to give substantive power to the Governor-General in respect of other tracts of country."

The power given here to the executive which makes its acts and operations independent of civil courts, is to be exercised within a certain tract of country defined by the Regulation, (sec. 2) and therefore cannot be exercised in other tracts of the country. Accordingly, any act which is done outside the defined tract would be cognisable by the civil court. Evidently the Garo Hills lay outside the defined limits, and thus came within the jurisdiction of the civil courts.

(2) The jurisdiction of the civil courts is taken away by clause 2, sec. 8 of the Regulation only in respect of a certain class of acts specified in the section; survey-award is not one of them and therefore the civil court is entitled to consider the present case which has been brought to contest a survey-award.

On the strength of the cases cited above and others to follow, we may lay down the following rules:—

1. The executive while exercising its statutory powers must go through all the formalities laid down and satisfy all the conditions precedent to the exercise of the same.

Thus where the Act provides that a notice should be issued before something is done, the issuing of the notice is an imperative formality, the absence of which would vitiate everything done under the Act (d). The notice should be issued in time, and where the terms of the notice are prescribed, there should be substantial compliance with the terms. The court, however, will not insist on a literal compliance(e).

Again where the executive is authorized to do an act or acts on the happening of an event, the happening of the event is a condition precedent to the performance of the act or acts. If, in the opinion of the court, the event did not in fact happen, the act or acts of the executive, as well as all claims and obligations arising therefrom will be wholly void and inoperative. Thus in the case of sales for arrears of revenue under Act XI of 1859, the Government can exercise its power of sale only when there have been arrears of Government revenue. If in the opinion of the court there have been no arrears, the sale would be void and inoperative and without any legal effect (f).

(d) *The Government of Bombay v. Dodyama Basapa*, I. L. R. 9 Bom. 478.

(e) *Hari Pandurang v. Secretary of State in Council*, I. L. R., 27 Bom. 424.

(f) *Ram Govind Roy v. Syad Kushufudora*, 15 W. R. 141, *Bajinath Sahu v. Lal Situl Prasad*, 2 B. L. R. (F. B.) 1.

2. It must use its powers consistently with the Act, that is to say, its acts must not be repugnant to the purport or provisions of the Act. This is very well brought out in the case of *Empress v. Nistar Raur(g)*, where it was held that under the provisions of the Indian Contagious Diseases Act, 1868, any woman desirous of ceasing to carry on the business of a common prostitute is absolutely entitled to have her name removed from the register and that, consequently any rule or portion of a rule purporting to have been made under the provisions of that Act, which placed any obstacle in the way of her doing so, was *ultra vires* and void. Here one of the rules made under the Act provided that applications by women to have their names removed from the register should be submitted to the commissioner who *if satisfied on inquiry that* the applicant had really ceased to practise as a common prostitute *might* cause her name to be removed. The court decided that the Government had no authority to make the rule, as it was inconsistent with and repugnant to the purport of the Act, which gave an absolute right to every prostitute to have her name removed from the register.

3. It must not go outside the powers given by the Act. *Government v. Raj Kissen Singh(h)* is a very good instance of this rule. There, as

(g) I. L. R. 6 Cal. 163.

(h) 8 W. R., 323; on app. 9 W. R. 426.

we have seen, the Government was entitled to do acts of a particular description. The survey-award did not come under that description. Held accordingly that it was outside the powers of the Government given by Regulation X of 1822 and was therefore cognizable by the civil courts. The decision in *Samaldas Bechar Desai v. The Secretary of State in Council* (i) was given on the same principle. There the Collector under Sec. 16 of Act VII of 1867 (Bombay) had recovered the cost of the punitive post from a Talukdar. It was held that the Collector had no such power as the Talukdar was not an inhabitant of the village and the cost could only be defrayed by a local rate imposed on the inhabitants of the district in which the punitive post was established (j).

4. If any territorial limits have been prescribed within which the powers are to be exercised, the acts and operations of the executive should be scrupulously confined to those limits. This is only an application of the principle laid down above. It was invoked, as we have seen, in the case of *Government v. Raj Kissen Sing* (k). *Queen Empress v. Mangal*

(i) I. L. R. 16 Bom. 455.

(j) See also *The Sub-collector of Colaba v. Gonesh Moreskhar Mehendale*, 10 Bom. H. C. Rep. 216.

(k) 8 W. R. 323 : on app. 9 W. R. 426

Tekchand (1) is another case on the point. There it was laid down that under Sec. 5 of the "Scheduled Districts (Act XIV of 1874) the Local Government could not by extending an Act which was of necessity of restricted application, make its provisions applicable to an entirely new area.

The law laid down above applies not only to the specific acts of the executive but also to the rules and regulations which from time to time they are authorized to make under Acts of Legislature. The rules and regulations so made have the force of law, but they must be strictly *intra vires* or they will be considered inoperative. This we have seen in the case of *Empress v. Nistar Raur* (m). There a rule of the Bengal Government was declared *ultra vires* and not binding, because it was repugnant to the purport of the Act under which the rule was made. In *Hardwar Singh v. Kheda Ojha* (n), a rule (o) relating to the powers of a Bench of Honorary Magistrates was declared *ultra vires*, on the ground that the Local Government had no power to frame the rule in question. Sec. 16 of the Code of Criminal

(1) I. L. R. 10 Bom. 274.

(m) I. L. R. 6 Cal. 163.

(n) I. L. R. 20 Cal. 870.

(o) Rule 8 of the rules which came into force on the 15th December, 1889 and framed under the Code of Criminal Procedure, sec. 16.

Procedure gave them power to frame rules relating to the *constitution of the Bench for conducting trials*. The rule in question purported to define the *powers which that Bench could exercise*. It was held therefore that the rule was clearly *ultra vires*.

Similarly in *Empress v. Kola Lalang* (p), it was held that a circular order issued under the Excise Act (Bengal Act VII of 1878) which fixed the limit at six quart bottles of country spirit as allowable for retail sales was without authority in as much as it had fixed the limit at an amount lower than that which was allowed by the Act. The circular was more stringent than the Act itself and therefore inoperative (q).

After what has been said, it is almost superfluous to mention that the rules of the executive not made under an Act of Legislature have not the force of law, and, that a public servant acting in obedience to them cannot be considered as acting in execution of his duty as a public servant if his act is otherwise illegal. This was laid down in *In re The Petition of Rakhmaji* (r) where on a complaint made by a sepoy deputed by a forest settlement officer to impress some carts for the use of the

(p) I. L. R. 8 Cal. 214.

(q) See also *Empress v. Ishan Chandra De* I. L. R. 9 Cp. 847. *Collector of Thana v. Dadabhai Bamanji* I. L. R. 1 Bom. 352. *Sethu v. Venkatarama* I. L. R. 9 Mad. 112.

(r) I. L. R. 9 Bom. 558.

latter, that the accused assaulted and prevented him from seizing his cart, a Magistrate convicted the accused under sec. 353 of the Penal Code (Act XIV of 1860) for obstructing and assaulting a public servant, it was held by the High Court that the conviction under sec. 353 was bad. It was contended for the Crown that the rules of the Local Government justified the seizure of carts and that therefore the accused in obstructing the sepoy was obstructing a public servant in execution of public duty. But the Court was of opinion that the rules of the Government had not the force of law and that the seizure of the carts under the rules was illegal (s).

Have the rules made and orders issued by Governments a retrospective effect? In the case of *Dowlattram Harji v. Vitho Radhoji(t)*, the High Court declined to consider a rule made by the Government of India subsequent to the making of the document which was the subject matter in the suit, presumably because the rule could have no retrospective effect. Similarly, in *Macdonald v. Riddel(u)* the High Court held that an order made under sec. 308 Cr. P. C., 1861, by the Local Government with retrospective effect was of no legal effect.

(s) See also *Budho v. Keso and another* I. L. R. 21 Bom. P. 773.

(t) I. L. R. 5 Bom. 188.

(u) 16 W. R. (Cr. Rulings) 79.

We shall conclude this lecture by noticing a somewhat anomalous case bearing on the powers of Local Government: *viz.*, *Queen Empress v. Ganga Ram*(v). Here the High Court of Allahabad while admitting that the appointment of one of its judges by the Lieutenant-Governor under the sanction of the Secretary of State for India, so far as its validity depended upon the provisions of sections 7 and 16 of the Indian High Courts Act, 1861, was apparently *ultra vires*; held that the appointment must be presumed to have been legally made in the exercise of some power *unknown* to the courts vested in the Secretary of State. It is difficult to reconcile this decision with the principles that have been followed by the courts in this country as well as in England in their interpretation of the constitution and powers of statutory bodies. The power of appointment of judges vested in the Crown and under certain conditions, in the Government of India, and the Local Government is a statutory body and its power must be exercised in accordance with the provisions of the statute or statutes which gives it the power. It is doubtful whether the decision will be followed by the other High Courts.

(v) I. L. R. 16 All. 136.

LECTURE V.

High Courts.

In this lecture, we shall treat of the High Courts and their powers. We shall begin by giving a history of the British courts in India, their origin and expansion.

Historical
sketch.

In lecture III, we noticed the charter of Charles II issued in 1661 which authorized the Governor and Council of each factory of the Company "to judge all persons belonging to the said governor and company or that shall be under them in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute judgment accordingly." Very little was done to carry out the provisions of the charter till 1678. Before that year, even at Madras which was the most important possession of the Company at that time, there was no proper judiciary, except that two or more officers of the Company used to sit as justices in the "choultry" to dispose of petty cases. In 1678, the Governor and Council at Madras under the authority of the charter of 1661 commenced the practice of sitting two days in the week to hear and judge all cases.

Grant of
Bombay to
the Com-
pany in
1669, by
Charter.

In 1669, the port and island of Bombay which had been ceded to the English king in 1661 (by the Portuguese), was granted by a charter to the East India Company, which

among other things authorized the Company, by their governor and other officers "to do all and every other thing and things, which unto the complete establishment of justice do belong, by courts, sessions, form of judicature and manner of proceedings therein" and "to award process, hold pleas, judge and determine all actions and suits and causes whatsoever..... and to execute all and every such judgment."

The Commissioners who went from Surat to take possession of Bombay, on behalf of the Company, recommended the appointment of a judge-advocate. Two courts were established, the inferior court consisting of a Company's officer and two Indians having a limited jurisdiction and the superior court, consisting of the Deputy Governor and Council (a).

Establishment of Courts in Bombay.

So far the administration of justice in the Company's settlements had been left entirely in the hands of the Company and their officers under the guidance and authority of the charters. In 1683, a new departure is noticeable in the policy of the British Cabinet. By a charter issued in that year, the king established a Court of Judicature to be held at such place or places as the Company might direct, consisting of one person learned in civil law and two others to assist him. The court was principally to be a Court of Admiralty, to judge all

Charter of 1683.

A Court of Admiralty established.

(a) Shaw's Charters, Preface p. ix.

mercantile and maritime cases whatsoever. It was directed to judge "according to the rules of equity and good conscience and according to the laws and customs of merchants and by such methods and rules and proceedings as we shall from time to time direct and appoint." Dr. St. John was appointed to act as a judge-advocate of the court at Surat. In or about 1686 Sir John Biggs was appointed as judge-advocate in Madras. The following year the Company authorized by the Crown established by charter a municipality at Madras, consisting of a mayor, twelve aldermen and sixty or more burgesses. A Mayor's Court was also established which was to be a Court of Record with power to try civil and criminal cases. An appeal lay from this court to the already existing Court of Admiralty. The charter also directed the appointment of a Recorder to assist the mayor in the administration of justice.

Charter of
1687. Mayor's court
established
at Madras.

In 1726, the Court of Directors petitioned the King to the effect that there was a great want at Madras, Fort William and Bombay of a proper and competent power and authority for the more speedy and effectual administration of justice in civil causes and for the trial and punishment of capital and other criminal offences and misdemeanours. In response to the petition, the existing courts were abolished and by charter, a Mayor's Court was established

Charter of
1726. Mayor's Courts
at Madras,
Bombay &
Calcutta.

at Calcutta, Madras and Bombay, consisting of the mayor and the aldermen. The court was to be a Court of Record and was authorized "to try and hear and determine all suits, actions and pleas between party and party." Appeals were allowed from the decisions of the Court to the Governor and Council. In all cases, involving sums less than 1000 pagodas, their decisions were final, but in cases involving sums exceeding that amount, a further appeal lay to the King in Council. This charter empowered the Governor and five senior members of the Council to act as justices of the peace and to hold quarter sessions for the trial of all offences except high treason.

In 1746, Madras fell into the hands of the French. On its restoration to the English in 1749, the Directors represented to the King in Council that it would be a great encouragement to persons to come and settle in Madras, if a proper and competent judicial authority were established there and further that the judiciaries established by the charter of 1726 had not proved wholly successful owing to certain defects in the charter. New letters patents were issued re-establishing the Mayor's Court not only at Madras but also at the other two presidency towns. Certain alterations were made in the jurisdiction of the new courts. Among others, the Mayor's Court was directed not to entertain suits between natives unless

Charter of
1753. Re-es-
tablishment
of the
Mayor's
Court at the
presidency
towns.

by consent of the parties ; while the jurisdiction of the Governor and Council was limited to offences committed within the town and factories subordinate to it.

Grant of
the Dewani,
1765.

Hitherto, we have been considering the Company's courts established under the authority of the King of England. Now we shall turn for a while to the courts which claimed their authority from the princes of this country *e.g.*, the Nawab of Bengal. In 1765, the grant of the Dewani to the East India Company was the signal for many important and far reaching changes in the judicial administration of the provinces of Bengal, Bihar and Orissa. The changes however were not effected till six or seven years later. During this period, the Company though they received the revenue and maintained the army, left the collection of the revenue as well as the administration of civil and criminal justice in the hands of the Nawab and his officers. But in 1771, the Directors resolved to stand forth as Dewan and to undertake the entire work and management of the revenues which involved the work of administering civil justice. In 1772 Warren Hastings came to Bengal as governor and steps were immediately taken, with a view to the collection of revenues directly through the Company's servants. A committee was appointed consisting of the Governor and Council. Its report drew attention to the incompetency of the

existing law courts and submitted proposals for the establishment of *Dewany* and *Foujdary Adawlut*, under the superintendence of British officers. These proposals were accepted and civil and criminal courts were established all over the Presidency.

The *Dewani* courts which were presided over by the Company's officers known as collectors, appointed principally to look after the collection of revenue and matters relating thereto took cognizance of all claims of debt, disputed accounts, contracts and demands of rent. Questions of successions to *zemindari*s and *talukdaries* were reserved for the decision of the Governor and Council.

Civil and criminal courts established in the districts of Bengal.

With a view to facilitate the administration of criminal justice, a criminal court known as *Foujdari Adawlut* was established in each district. In these courts, the Kazi and Mufti sat to expound the law as well as to try offences, but the collector of the district was to attend and to see that their decisions were fair and impartial.

Besides these Mafussal courts, two superior courts were established at the chief seat of government, known as *Sudder Dewani Adawlut* and *Sudder Nizamut Adawlut*. The former was presided over by the Governor and Council and was a court of appeal in all civil cases involving sums over Rs. 500. The latter was the chief court of criminal appeal and

Sudder Dewani and *Sudder Nizamut Adawlut* established.

was presided over by an officer appointed on behalf of the Nazim. The duty of the court was to revise and confirm in some cases *e.g.*, death, the decisions of the Maffusil Foujdari courts. These courts, it should be remembered, were established and maintained in the name of the Emperor of Delhi who still remained the lawful though nominal sovereign of the country.

Regulating
Act, 1773.

The granting of the Dewani to the Company was followed by considerable agitation in England, as a consequence of which, a secret committee was appointed to enquire into the Company's affairs in this country. The committee, among other things, drew attention to the inefficiency of the then existing Mayor's Courts and upon their report was passed the Regulating Act of 1773 (*b*). This statute authorized the establishment by Royal Charter of a Supreme Court of Judicature at Fort William in Bengal, consisting of a Chief Justice and three other judges, being barristers of England or Ireland, of not less than five years standing, who were to be appointed by the Crown (*c*).

Establish-
ment of the
Supreme
Court in
Calcutta.

The statute further declared that the court was to have full power and authority "to exercise and perform all civil, criminal, admiralty and ecclesiastical jurisdiction, and to form and establish such rules of practice and

(*b*) 13 George iii, c. 63

(*c*) See section 13 *Ibid.*

such rules for the process of the said court as should be found necessary for the administration of justice and due execution of all or any of the powers which should or might be granted to the court, and also should be at all times a Court of Record and should be a Court of Oyer and Terminer and Gaol Delivery in and for the town of Calcutta and the factories subordinate to it"(d).

In pursuance of the statute, a Supreme Court was established at Calcutta by Royal Charter in 1774. We cannot here go into an elaborate discussion of the provision of the charter or the statute. But we shall notice the important points concerning jurisdiction which were raised in the dispute which soon followed between the executive and the judiciary in Bengal.

The Royal
Charter of
1774.

By the provisions of the charter and in conformity with the statute, the Supreme Court was vested with full power and authority to hear and determine all complaints against any of His Majesty's subjects for crimes, misdemeanours or oppressions and also to enter, hear and determine any suit or action against any of His Majesty's subjects in Bengal, Behar and Orissa and any suit, action, or complaint against any person in the service of the Company or any of His Majesty's subjects. It was, however, expressly provided (1) that the court should not

(d) Sec. 13 *Ibid.*

hear or determine any indictment or information against the Governor or any member of the council for any offence, not being a felony or treason; (2) that the court should not hear and determine any suits and actions of any of His Majesty's subjects against any Indian, residing in Bengal, Bihar and Orissa, except where upon a contract in writing such Indian should have agreed that in case of dispute the matter should be determined in the Supreme Court and where the cause of action should have exceeded Rs. 500.

As in the case of the Mayor's or Recorder's court, an appeal was allowed to the King in Council from the decisions of the Supreme Court, under certain conditions, both in civil and criminal cases; but in the latter the conditions were much more stringent than in the former.

Even a cursory perusal of the statute and the charter would convince one that the powers given by them, wide and extensive as they were, were not clearly defined. In the first place, as Mr. Ilbert points out, it is not made clear as to what law the court was to administer. "Apparently it was the unregenerate English law, insular, technical, formless, tempered in its application to English circumstances by the quibbles of judges and the obstinacy of juries, capable of being an instrument of the most monstrous injustice when

administered in an atmosphere different from that in which it had grown up (e).

In the second place, what was the jurisdiction of the court? It was declared to extend over the whole of Bengal Presidency *in respect of His Majesty's subjects and their employees*. But no attempt was made in the charter to define as to who were His Majesty's subjects or who were their employees. The judges were apparently under the impression that the sovereignty of the King of England had taken the place of that of the Emperor of Delhi in the provinces of Bengal, Bihar and Orissa: and accordingly they exercised their authority all over the country by issuing writs on all persons whether, strictly speaking, there were the subjects of the English King or their employees or not. Thus, in the *Cossijurah case* the court issued a writ against a Raja who was instructed by the Governor and Council not to obey it. The Sheriff and his officers were driven off by the Company's sepoys. Thereupon the court took proceedings against the officers of the Company. Their attorney was thrown into prison and the Governor-General and his councillors were served with summons to appear.

The Cossijurah case.

The court also assumed the right to try actions against the judicial officers of the Company for acts done in their judicial capacity. It

The Patna case.

(e) Ilbert's Government of India, p. 56.

did not recognize the Company's courts as having any authority. The Emperor of Delhi was a phantom and his courts were no better. Thus in the well-known *Patna case*, the Supreme Court gave judgment against officers of the Patna provincial court and had the defendants cast into prison.

The Amending Act,
1781.

These conflicts between the executive and the judiciary led to a serious dislocation of the administrative machinery of the country, and Parliament had to intervene. In 1781, an Amending Act (*f*) was passed which with a view to secure the prestige and efficiency of the executive as well as to ensure justice to the native population according to their own laws and customs, made the following changes in the powers of the court.

First:—The Act declared that the Governor-General and his councillors were not to be subject, jointly or severally, to the jurisdiction of the Supreme Court for any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their official capacity only.—Sec. 1 (*g*).

Secondly :—Persons impleaded in any action or process, civil or criminal, for any act or acts done by the order of the Governor-General and Council in writing, could give the order in evidence, which order with proof that the

(*f*) 21 George III, C. 70.

(*g*) See Morley's Digest Sec. 106.

act or acts done had been done according to the purport of the same, should amount to a justification of the said act or acts, and the defendant should be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the Supreme Court.—Sec. 2.

Provided always, that with respect to such order or orders of the Governor-General and Council as should extend to a British subject, the Supreme Court should have and retain as full and competent jurisdiction as if the Act of 1781 had not been passed.—Sec. 3.

Thirdly :—The Supreme Court was directed not to exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in its collection, according to the usage and practice of the country or the regulations of the Governor-General and Council.—Sec. 8 (*h*).

Fourthly :—It was declared that no person should be subject to the jurisdiction of the Court merely by reason of his being landowner, land-holder or farmer of land or rent or by reason of his being employed by the Company or by a native of Great Britain in any matter of dealing or contract between party and party except in acts for wrongs and trespasses.

(*h*) See Morley's Digest Sec. 101.

Fifthly :—It was provided that the Court should have jurisdiction in actions and suits against the inhabitants of Calcutta but that it should judge them according to their native laws and customs in all matters relating to inheritance and succession to lands, rents and goods and of contract and dealing between party and party.—Sec. 17.

The various limitations imposed on the powers of the Supreme Court achieved two things—(1) they placed the executive above the judiciary; (2) they gave an assurance to the native population that they would not be harrassed by the processes of the court, and that when within its jurisdiction, they would be, in most cases, judged according to their own laws and usages. The statute also recognized the appellate functions of the *Sudder Dewany Adawlat* instituted by Warren Hastings for hearing appeals from the *Moffusil* courts; made it a Court of Record; allowed appeals to the King's Council from its decisions in civil causes which exceeded £ 5,000; and invested it with full authority to hear and determine all offences and abuses committed in the collection of revenues.

The Supreme Court as amended by the Act of 1781 existed for 80 years when it was abolished and replaced by the present High Court. During this period, statutes were passed from time to time altering its jurisdiction and constitution.

By sec. 29 of 26 Geo. III C. 57, the Court was authorized to take cognizance of offences committed by British subjects outside India. All servants of the East India Company and all His Majesty's subjects resident in India were by this section made subject to the Courts of Oyer and Terminer and Gaol Delivery for all criminal offences committed in any part of Asia, Africa and America beyond the Cape of Good Hope to the Straits of Magellan within the limits of the Company's trade (i).

Jurisdiction
of the Court
extended.
26 Geo. III
C. 57 Sec.
29. 1786.

Again, doubts having arisen as to the extent of the admiralty jurisdiction of the Court, it was enacted by sec. 156 of 33 Geo. III C. 152 that the Court should have power and authority to try all offences committed on the high seas according to the laws and customs of the admiralty of England and by means of properly constituted juries.

Admiralty
jurisdiction
declared and
confirmed

We have seen that the statute establishing the Supreme Court limited its jurisdiction to the provinces of Bengal, Bihar and Orissa. In 1775, Benares was ceded to the Company and to provide for its judicial administration, it was enacted by 39 and 40 Geo. III C. 79. S. 20 that the authority of the Supreme Court should extend to the province or district of Benares and "over all the factories, districts and places which now are or hereafter shall be made

39 and 40
Geo. III C.
79. Sec. 20.
1800.

(i) This section has been repealed.

subordinate thereto and to and over all such provinces and districts as may at any time hereafter be annexed and made subject to the said Presidency of Fort William aforesaid."

Number of
judges re-
duced :

37 Geo III.
C. 142 Sec.
1.

By sec. 1 of 37 Geo. III C. 142, the number of judges of the Supreme Court was reduced to three.

Recorder's
Court esta-
blished at
Madras and
Bombay un-
der statute,
1779.

It now remains to trace the history of the Courts in Madras and Bombay. We saw that by Letters Patents issued in 1753, Mayor's courts were established in the Madras and Bombay as well as in Calcutta. That in Calcutta was replaced by the Supreme Court in 1774. Those in Madras and Bombay existed till 1797 when they were by statute abolished and replaced by Recorder's courts. These courts composed of the Mayor, three aldermen and a Recorder were given power to exercise jurisdiction in matters, civil, criminal, admiralty and ecclesiastical. They were also authorized to frame rules of practice and to act as Courts of Oyer and Terminer and Gaol Delivery for Fort St. George and Bombay. As in the case of the Supreme Court at Calcutta, their jurisdiction extended to British subjects residing in the Presidencies of Madras and Bombay, and besides, to those residing in the territories of native princes who were in alliance with the Company.

The Government of India Act, 1800, abolished the Recorder's Court at Madras and

authorized the Crown to establish by charter a Supreme Court in its place. The court was placed on the same footing as the court at Calcutta, invested with the same powers and subject to the same restrictions. The charter creating the court was issued next year, in 1801. The Recorder's Court at Bombay continued to exist till 1823 when the Crown was empowered by statute to establish a third Supreme Court at Bombay on the same lines as its predecessors.

Supreme Court established at Madras in 1801 and at Bombay in 1823.

Thus in the course of 150 years since the grant of the charter of Charles II dated 1661, which for the first time gave the Company definite judicial powers, three Supreme Courts of Judicature came to be established in British India under the direct control of the King and independent of the Company. They continued to exist till 1861 without undergoing any great changes, when they were abolished by the Indian High Courts Act and superseded by the existing High Courts.

The resumption by the Crown of its territorial possession in India in 1858 was followed by a reconstitution of the law courts. By the Indian High Courts Act, 1861(*j*), the Supreme Courts and the *Sudder Dewani* and the *Foujdary* Courts in the three Presidency towns were abolished. The High Courts which superseded them were vested with their combined powers.

The Indian High Courts Act, 1861.

(*j*) 24 and 25 Vict: C. 104.

High
Courts es-
tablished at
Calcutta,
Madras and
Bombay.

Section 1 of the Indian High Courts Act authorized the establishment of High Courts in Bengal, Madras and Bombay by Letters Patents. In pursuance of this section, the Crown established by charter High Courts at the three Presidency towns in 1862. The charters of that year were withdrawn in favour new ones issued in 1865.

Jurisdiction
of the High
Courts,

Sec. 9 of the Act enacted that "each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patents as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby ;

"And, save as by such Letters Patents may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and

authority whatsoever in any manner vested in any of the courts in the same Presidency abolished under this Act at the time of abolition of such last mentioned courts."

Under the authority of this statute and the charters issued under it, the High Courts have come to exercise the powers of the Supreme Courts as well as those of the *Sudder Dewani* and *Foujdari Adawlut*s which were abolished by the Act. Thus they have an original and an appellate side. On their ordinary original side, the authority of the High Courts extends to the Presidency towns, but on their appellate side, their authority extends over the whole province for which they are respectively established. They are not only entitled to entertain appeals from the subordinate Courts, but also to exercise superintendence over them with a general power to issue rules to regulate their practice and proceedings subject, however, to the sanction of the Governor-General in Council. This was not so during the days of the Supreme Courts when there was a complete separation between the Presidency and the *Moffusil* courts. Now however, as already indicated, the former have obtained extensive powers over the latter.

Powers of
the High
Court with
respect to
subordinate
courts.

They can call for local returns; direct the transfer of any suit or appeal from any *Moffusil* court to any other court of equal or superior judisdiction. And lastly, they have power to

Sec. 15.

make and issue general rules for regulating their practice and proceedings and for keeping all books and entries and to settle tables of fees to be allowed to the sheriff, attorneys, clerks and officers of courts.

High Court
at Allahabad,
1865.

Sec. 16.

The Act of 1861, in addition to the High Courts in Calcutta, Madras and Bombay, authorized the establishment of a High Court in Allahabad which was effected in 1865 under charter from the Crown.

Power of
the courts to
make rules.

"Our courts of law, especially the High Courts, have various powers delegated to them by the legislature, beside the power to adjudicate between litigants. For instance, under certain legislative enactments, the High Courts are given the power to frame rules, settle tables of fees and so forth. In exercising these powers, the High Courts do not act in their judicial capacity and if they frame a rule which they are not empowered to frame, the rule will be one made *ultra vires*." Thus in the case of *Jagatkishore Acharya Choudhury v. Dinanath Choudhury*(*k*), the question was raised whether Art. 3. Part II of the Rules made under Sec. 20 of the Court Fees Act was *ultra vires*. Art 3, Part II fixes the rate of remuneration for commission and adds in a note that all fees due to the commissioner must be paid before the latter's report or other returns be given in evidence. In the present case, the

whole amount due to the commissioner was not paid, and the subordinate judge relying on the rule above mentioned, refused to take the commissioner's report as evidence. On reference to the High Court, it was held, "we are also of opinion that Art 3 of the Rules is itself *ultra-vires*. A commission is not in our opinion a process within the meaning of sec. 20 of the Court Fees Act. Process has a well understood meaning within which such a commission can not be included. The note also is *ultravires*. It is inconsistent with sec. 373 of the Civil Procedure Code which says that the report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the records (1).

Here, the High Court was authorized to fix the remuneration for work done under *process*. It however went on to fix the remuneration for work done under *commission*. This is clearly *ultra vires*. Further, the High Court's note that the commissioner's report should not be read till all fees due had been paid is inconsistent with the existing law which directs that they should be read and form part of the record, and is therefore *ultravires*.

Similarly in *In the matter of Desputty*

(1) See also *In re Flemming Spinning and Weaving Company Limited* I. L. R. 3 Bom. 439; *Rajam Chetti v. Seshayya* I. L. R. 18 Mad. 236.

Singh v. Doolar Ray(*m*), it was held that the rule of a subordinate court prescribing certain hours for the receipt of petitions and hearing of motions could not operate to alter the period of limitation prescribed by law. Here the munsiff refused to receive a plaint which was tendered by the petitioner on the ground that it was not presented during the hours set apart for receiving of plaints. The consequence was that the petitioner's claim was barred by limitation. Every court has power to frame rules for the proper carrying on of its business and can, accordingly set apart certain hours for certain kinds of work, but they would be *ultra-vires* if they attempted to interfere with the operation of any existing law or laws.

Constitu-
tion of the
High
Courts.

Each High Court consists of a Chief Justice and as many judges not exceeding fifteen, as His Majesty may think fit to appoint. The Letter Patent for each of the High Courts fixes the *number* of judges. The question has been raised whether if the number of judges at any time fall below the number fixed, the court should cease to exist and be incompetent to carry out its functions. It has been decided in *Lal Singh and others v. Ghansam Singh*(*n*) that no omission to fill up a vacancy under Sec. 7 of the Indian High Courts Act amongst the puisne judges could operate to suspend the

(*m*) I. L. R. 1 C. L. R. 291

(*n*) I. L. R. 9 All. 625.

jurisdiction and functions of the Chief Justice and subsisting judges of the court. It was pointed out however in the above case that the Chief Justice was essential to the existence of the court.

Since the Act of 1865, not many changes have been made in the powers or constitution of the High Courts. We shall bring our treatment of this subject to a close by a short notice of the few changes that have been effected.

(1) By Sec. 3 of the Indian High Courts' Act, 1865, the Government of India has been authorized to transfer by order, from time to time, any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, and to empower any High Court to exercise all or any portion of its jurisdiction and powers in any part of British India not included within the limits of the place or Presidency for which it was established; and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty residing in any of the native states in alliance with His Majesty.

The Indian High Courts' Act, 1865; the jurisdiction may be extended.

(2) By Sec. 2 of the Indian High Courts' Act, the maximum number of judges, beside the Chief Justice, was fifteen. The Indian High Courts' Act, 1911, has raised the number to twenty. It has also empowered the Governor-General in Council to establish High Courts.

The India High Courts' Act, 1911: Number of judges.

Uncharter-
ed High
Courts :
Chief
Courts :
Punjab,
Burma and
Courts of
Judicial
Commis-
sioners.
Their
powers.

Besides the Chartered High Courts established at Calcutta, Madras, Bombay and Allahabad, there are at present several unchartered High Courts, established by Acts of the Governor-General in Council. These are the Chief Courts at Lahore and Rangoon and the Courts of the Judicial Commissioners in the Central Provinces, Upper Burma, Oudh, Berar and Sind. They exercise appellate jurisdiction and supervision over the courts subordinate to them in the same manner as the Chartered High Courts and their decisions are subject to appeal to the Privy Council in the same manner as those of the High Courts.

LECTURE VI.

Corporation.

A corporation is a body politic which constituted by or composed of one or more individuals is distinct from them, and which is vested by the policy of law with continuous identity and with the capacity of acting in certain respects as an individual.

Definition
of corpora-
tion.

An analysis of this definition or description would show three elements in the notion of a corporation: (1) its distinctness from the constituent members, (2) its continuous identity and perpetual succession, and (3) its artificiality.

"The earliest definition of a corporation of which a record has been found is in Smith's (Sir James) case (1691), Carth. 217; where it is stated to be an artificial body composed of divers constituent members like the human body and that the ligaments of this body politic or artificial body are the franchises and liberties thereof which bind and unite all its members together, and the whole frame and essence of the corporation consist therein." In 1691 Lord Holt, C. J. (Holt (K. B.), 168) defined a corporation as an *ens civile*, a *corpus politicum* a *collegium*, an *universitas*. a *jus havendi et agendi*. For a later definition see Grant, *Law of Corporations* (1850), p. 4. where "a corporation is defined as a continuous identity; endowed at its creation with capacity for endless duration; residing in the grantees of it and their successors, its acts being determined by the will of a majority of the existing body of its grantees or their successors at any given time, acting within the limits imposed by the constitution of their body politic, such will being signified to strangers by writing under the common seal; having a name and under

Distinctness
from consti-
tuents.

A corporation is, in the eye of law, an entirely distinct person from those who constitute or compose it. The constituent member or members are not the corporation. They may sue and be sued by the corporation (a). The rights and liabilities of the latter are not the rights and liabilities of the former. It has been laid down that, generally speaking, the individuals can not enforce the rights of the corporation of which they happen to be members (b), nor are they responsible for the proper discharge of its duties and liabilities. A corporation, being incorporeal, acts by or through its agents. But the members *as such* are not its agents. And so notice to an indivi-

such name a capacity for taking, holding and enjoying all kinds of property, a qualified right of disposing of its possessions and also a capacity for taking, holding and enjoying, but inalienably, liberties, franchises, exemptions and privileges; together with the right and obligation of suing and being sued only under such name." Halsbury's Laws of England Vol. 8 301-302.

A shorter definition is given by Dillon, "Municipal Corporations" p. 91 which Mr. Brice adopts *viz*, "a corporation is a legal institution, devised to confer upon the individuals of which it is composed powers, privileges and immunities, which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession under the corporate name notwithstanding successive changes by death or otherwise in the corporators or members of the corporation."

(a) *Hope v. International Financial Society*. W. N. 1876, p. 257. In this case, an injunction was applied for and obtained by a share-holder to restrain the directors from acting upon a resolution. ¹

(b) *Mozley v. Alston*, 1 Ph. 790; *Foss v. Harbottle*. (1843), 2 Hare 461, 490. *Cooch v. Goodman*, 2 Q. B. 580.

dual member is not notice to the corporation(c). And lastly, the corporate funds and not the estates of the individual members are (unless there are provisions to the contrary in the constating instruments) alone and solely responsible for the payment of the debts and other pecuniary liabilities of the corporation.

The distinct legal personality of a corporation is very clearly brought out in *Salomon v. Salomon (d)*, where we have a company which was really a one-man company—the six of the shareholders whose names appeared in the memorandum of association being nearly nominal shareholders. But observed Lord Herschell notwithstanding: “The company *ex hypothesi* is a distinct legal *persona*..... It was said that in the present case, the six shareholders other than the applicant are mere dummies and.....I assume that this was so. In my opinion, it makes no difference.”

A corporation enjoys continuous identity and perpetual succession. The legal existence of a natural person ceases with his death, but that of a corporation is not affected by the death or retirement of its members or by alterations in its government and constitution.

Its continuous identity.

(c) *Steward v. Dunn* (1844) 1 Dow & L. 642, 649.

(d) 1897 A. C. 22, 45, 51; See also *Kodak Ltd. v. Clark*, (1902), 2 K. B. 450; (1903), 1 K. B. 505; *Janson v. Driefontein &c. Mines*, (1902); A. C. 484; *Gramophone etc. Ltd. v. Stanley*, (1905), 2 K. B. 856.

These changes notwithstanding, the corporation continues to exist with its rights and liabilities. This principle has been affirmed in a number of cases. In *Attorney-General v. Corporation of Newcastle*, the Master of the Rolls expressed himself thus: "I have had on more than one occasion to consider the effect of the Municipal Corporation Act (5 & 6 Wm. IV c. 76. s. 92) and I have considered that it is not a new corporation but a newly constituted government of the old corporation; that what is called the new corporation remains subject to all the liabilities of the old corporation which have to be satisfied in the same manner as if no alteration had taken place. No doubt, some hardship occurs where liabilities are fixed on the ratepayers in a town which they were not subject to before the Act. But the liabilities of the old corporation pass with the property to the new corporation which is a continuation of the old corporation with a change of government (e).

Its artificiality.

A corporation, though it is constituted or represented by one or more natural persons is itself an *artificial* legal entity. As Lord Coke puts it, a corporation aggregate of many is invisible, immortal, rests only in intendment and consideration of law. From this it would seem to follow that a corporation does not

(e) *The Attorney-General v. Corporation of Newcastle*, 5 Beav. p. 315; the *Attorney-General v. Kerr*, 2 Beav. p. 420. The *Attorney-General v. Corporation of Leicester*, 9 Beav. 546.

enjoy all the rights and obligations of natural persons, but only those with which it has been specially invested by law. This is sometimes expressed by saying that whereas a natural person may do whatever he likes except what he is expressly forbidden to do, a corporation may do only that which it is expressly allowed to do. This distinction explains many of the peculiarities of the law of corporate bodies and is in fact at the root of the doctrine of *ultra vires*.

A corporation being an artificial entity, in the sense described above, its powers or capacities are derived from its constituting instruments or from custom. But in addition to these Blackstone mentions certain capacities or incidents which are common to all corporations. They are as follows:

1. To have perpetual succession.
2. To sue or be sued, implead or be impleaded, grant or receive, by its name and do all other acts as natural persons may.
3. To purchase land and hold them for the benefit of themselves and their successors.
4. To have a common seal.
5. To make bye-laws or private statutes for the better government of the corporation, which are binding upon themselves, unless contrary to the laws of the land, and then they are void.

1. *To have perpetual succession.* It has been said that corporations never die. This is true

in the sense that they are not liable to die a natural death. But they are not necessarily immortal. If a corporation is created for a definite object or for a definite period it ceases to exist the moment the object is attained or the period completed. Again, a corporation may, by abusing its powers, forfeit its franchise and thus come to an end. It has been contended that at common law the King can not create a corporation for a definite period. But the fact is that the King has more than once granted charters of incorporations which were to last for definite periods only, *e.g.*, the East India Company was by Elizabeth's charter incorporated for fifteen years only. But apart from common-law power, the King has by statute been authorised to limit the duration of corporations created by it (*f*).

But though a corporation does not enjoy perpetual succession in the sense that it can go on for ever, yet it may be said to enjoy it in the sense that during the period of its duration, its existence is uninterrupted, that is to say, remains identical, notwithstanding death or retirement of its members or alterations of its government. The object for which a corporation is created could hardly be accomplished, if it ceased to exist with the death or retirement of any of its members. Provisions are made in the constating instruments for the

(*f*) 1 Vic. c. 73. sec. 29.

election or nomination of new members, and so long as these are observed and new members nominated or elected to take the place of old ones, the corporation continues to exist.

2. *To sue and be sued.....do all other acts as natural persons may.* This proposition requires qualification. As regards the powers of common-law corporations created by charter, the current of authorities seems to be in favour of Blackstone's view(*g*). "A corporation created by charter has at common law power to deal with its property and to incur liabilities in the same manner as an ordinary individual"(*h*). The Crown may, if a statutory corporation abuses its powers, repeal its franchise. "But if the Crown takes no such steps, it does not, as I conceive, lie in the mouth either of the corporation or of the person who has contracted with it to say that the contract into which they have entered was void as beyond the capacity of the corporation"(*i*).

Brice following Grant is not inclined to accept this view of the power of chartered corporations (*j*). The point is a difficult one

(*g*) Buckley on Companies and Limited Partnerships Act, 1908, p. 11.

(*h*) See also Halsbury's Laws of England vol. 8 p. 359. See also *Sutton's Hospital Case* (1012) 10 Coke's Rep. (29a, 30b.)

(*i*) *Riche v. Ashburj Ry. Co.*, L. R. 9 Ex. 263-4 per Blackburn J.

(*j*) Brice on *Ultra Vires* pp. 4-5. It should be noticed that Blackburn J's view is mere *obiter dictum*. See also *Wenlock (Baroness) v. River Dee*, (1887) 36 Ch. D. 675, per Bowen L. J. p. 685.

and there is no definite pronouncement of courts of law on it. But whatever be the powers of chartered corporations, there is no dispute at present as regards those of statutory corporations. Beyond doubt, these latter have not all such powers as natural persons have. The law was clearly and definitely laid down in *Ashbury Ry. Co. v. Riche* by the House of Lords and has been followed ever since^(k). "A statutory corporation created by Act of Parliament is limited to all its powers by purposes of its incorporation as defined in that Act." These bodies are created by statutes for certain purpose and are invested with certain powers, expressly or by implication. The courts have held that their acts and transactions are circumscribed by the powers given them and that they are not legally competent to engage in acts or transactions in excess of those powers.

3. *To purchase lands etc.* This is a common law power, but it has been partly restricted by Mortmain and other statutes.

4. *To have a common seal.* A corporation is incorporeal. It acts through and by its agents. Its acts and transactions have to be, as a general rule, under the common seal which serves as a proof of their authenticity *e.g.*, when the official of a corporation affixes the

(k) L. R. 7 H. L. 653. *Amalgamated Society of Ry. Servants v. Osborne*, L. R. (1910) A. C. p. 87.

common seal to an instrument, that is a clear and unmistakeable indication that the corporation itself is a party to the instrument. Hence to have a common seal is the incident of every corporation, and so evidence that there was a time when a borough had not a common seal was admissible to prove that it was not then a corporation. But every body politic which has a common seal is not necessarily a corporation. For example, the Inns of Courts are not corporations, though they have common seals.

"A corporation may change its seal at pleasure and even make use of the seal of an individual so long as the seal which is actually used is applied to the seal of the corporation for the time being"(l).

5. *To make bye-laws, etc.*—A corporation is entitled to make rules and regulations to carry on its affairs. As a rule they bind the members and not outsiders, unless they had notice of the same(m). But in some cases, *e.g.*, municipalities, they bind outsiders also. The rules must be just and reasonable and not uncertain, that is to say, they must give adequate information as

(l) *Bailliffs of Ipswich v. Johnston*; 2 Barnard 120. Halbury's Laws of England, vol. 8, p. 309. *Yarmouth Corporation v. Cowper* (1629) Godb. 439; *Coch v. Goodman*, 2 Q. B., 580. *Gray v. Lewis* (1869) L. R. 8 Eq. 531. Mr. Brice is inclined to dissent from this view. See *Ultra Vires*, p. 5.

(m) *Child v. Hudson's Bay Co.*, 2 P. Wms. 207. *Re Asiatic Banking Co.*—Indian case L. R. 4 Ch 252.

to the duties of those who are to obey. Nor must they be at variance with the laws of the realm, inconsistent with the terms of its incorporation or beyond the scope of its powers. And lastly, they must be made in good faith; must not be manifestly partial and unequal in their operation nor involve unjustifiable interference with the liberty of those subject to it (*n*).

Locality.—Every corporation must have a locality or place of habitation which is called its domicile. A corporation may have more than one domicile (*o*). The place where a corporation carries on its general business is its domicile. Thus in the case of a trading or commercial corporation, the head office from where it manages and supervises its business is its locality. It does not matter that the greater part, or the whole of its business or property is carried on or situated outside the country(*p*).

(*n*) *Elwood v. Bullock*, 6 Q. B. 383. *Dyson v. L. & N. W. Ry.* 7 Q. B. D. 32. *R. v. Spencer*, 3 Burr., 1827.

(*o*) *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416 per Lord St. Leonards at p. 449. But the point does not seem to be beyond dispute. See *Goerz & Co. v. Bell*, (1904), 2 K. B. 136. *Saunders v. S. E. Ry.*, 5 Q. B. D., 456. *Bentham v. Hoyle*, 3 Q. B. D., 289. *Shillito v. Thomson*, 1 Q. B. D. 12. *Kruse v. Johnson*, (1898), 2 Q. B. 94. *Marsh v. Findlay*, 85 L. T., p. 862. *Scott v. Pilliner*, (1904), 2 K. B., p. 855. *Parker v. Mayor of Bournemouth*, 86 L. T., p. 449.

(*p*) *Calcutta Jute Mills Co. v. Nicholson*, (1876) 1 Ex. D. 437 per Kelly C. B. at p. 444.

What is the status of a foreign corporation in the eye of our courts? Strictly speaking corporations which are not incorporated according to the laws of our country have no legal existence and should receive no recognition as such. As an American judge has put it, "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." But this strict rule of law has not been followed. It is now established that a foreign corporation whether residing in this country or abroad can sue and be sued in our courts (*q*). A foreign corporation is considered resident in this country if it carries on business at a fixed place, and for purposes of suing it service on its head officer is considered sufficient (*r*).

Foreign
Corpora-
tions.

Corporations are of various kinds and their classification finds a place in most text books on the subject. They may be classified according to three different modes or principles :

Classifica-
tion of Cor-
porations.

(1) According to the *number of corporators* necessary to constitute them.

(2) According to the *object* they have in view.

(3) According to the *mode of their creation*.

(*q*) *Dutch West India Co. v. Van Jellies*, Stra. 611
Henriques v. Dutch West India Co. 2 Ld. Raym, 1532.

(*r*) *Newby v. Van Oppen etc. Mfg. Co.*, 7 Q. B. D., 293
*Dunlop Pneumatic Tyre Co., Ltd., v. Actien-Gesellschaft für
Motor und Motor-zeugbau vorm. Cudell & Co.*, (1902) 1
K. B., 342.

1. Corporations, sole and aggregate.

A corporation is either sole or aggregate according as it is composed of or represented by one or more persons. A corporation sole is for the time being constituted by a single individual; a corporation aggregate by at least two. Most corporations belong to the latter type. The number of corporations sole is limited. The King is a corporation sole; so is a Bishop and an Archbishop, the Vicar of a Parish and certain other ecclesiastical functionaries.

A corporation sole is described by Grant as follows: "A corporation sole is a body politic, having perpetual succession and being constituted in a single person, who, in right of some office or function, has a capacity to take, purchase, hold, and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alien) lands, tenements, and hereditaments, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; that is, there may be and mostly are, periods in the duration of a corporation sole occurring irregularly in which there is a vacancy, or no one in existence in whom the corporation resides and is visibly represented"(s).

The corporations with which we have to deal are mostly corporations aggregate. They

(s) Grant on Corporations p. 636.

must consist at least of two members. In some cases their maximum or minimum number or both is limited by statute.

Here we may divide corporations into two classes *viz.*, those that are *ecclesiastical i.e.*, connected with the Church of England and those that are not so, called *lay*. There are just a few ecclesiastical corporations *e.g.* the holders of bishoprics and archbishoprics, the Colleges of Oxford and Cambridge. As is obvious from the examples, ecclesiastical corporations may be either sole or aggregate. For instance, the Bishop is a corporation sole; Trinity College, Cambridge, is a corporation aggregate.

2. Corporations—their objects and purposes.

Lay corporations may be further divided according to the various objects or purposes which they are intended to accomplish. And here we may begin by placing them in two subdivisions *viz.*, *commercial* and *non-commercial*.

Commercial corporations are of two kinds, *viz.* (1) those that are of a semi-public character and (2) those that are purely mercantile. The former as much as the latter have primarily nothing else in view but gain for those who compose them. But they are distinguished from the latter in that they are invested with large powers affecting the rights of the public and that they are engaged in enterprises in which the public are interested; for example, railway companies, gas and electric companies

etc. are carried on primarily for profit, but though yielding profit to a limited number of private individuals, the public are highly interested in them.

The *mercantile* corporations are purely private bodies and are run for the sake of private gain. There are a few which have been created by special charters or acts *e.g.*, East India Company, the Presidency Banks in this country. But most of them, unlike the semi-public corporations noticed above, are created under general acts *viz.*, the Companies' Acts. "These comprise bodies of many diversity of enterprise and scope; there is no limitation in the Companies' Acts as to the purposes or objects of registered companies."

Non-commercial corporations are distinguished from the former in not being carried on for purposes of gain. They comprise bodies having a variety of purposes other than those of gain. They are *public e.g.*, municipalities, district boards, universities which are corporate bodies created to look after matters of a public character; or *private e.g.* friendly societies, co-operative associations which exist for helping their members or for some other purpose other than gain.

3. Corporations: their creation.

Corporations come into existence in various ways. Individuals by any arrangement among themselves cannot incorporate themselves and give themselves the power of a corporate body.

The power of incorporation is vested in the Crown and is exercised expressly or by implication. Thus we get two classes of corporations, those that exist by express authorisation and those that exist by implied authorisation. Again the express authorisation may be given either by a Royal Charter or by a legislative enactment. We thus arrive at the well known distinction between (1) *chartered* corporations and (2) *statutory* corporations. The East India Company was a corporation created by charter while the Presidency Banks were created by Acts of the Indian legislative. Again, an act of the legislative may be passed for creating a particular corporation, as for example, the Bengal Legislative Council recently passed an Act creating the Calcutta Improvement Trust, or, the act may be of a general character whereby an indefinite number of corporate bodies may be created on compliance with its provisions. The Indian Companies' Act of 1882 is an Act of this character.

Both chartered and statutory corporations exist by the *express* authorisation of the Crown. We shall now notice those which exist by its implied authorisation. These are—

- (1) corporations at common law,
- (2) corporations by prescription,
- (3) corporations by implication;

These are bodies whose corporate character has been recognised from time immemorial by

Corpora-
tions at
common
law.

the State. The king is a corporation at common law. So are Parliament, holders of bishoprics etc.

Corpora-
tions by
prescription

These, too, like the former, have existed from time immemorial. But it is supposed that they were created by Royal charter or Act of Parliament which had been lost. Unlike the former, they have to prove that they have exercised corporate rights in a course of immemorial uniform usage and in pleading they must aver that they have existed from time immemorial.

Corpora-
tions by im-
plication.

These are not supposed to have existed from time immemorial, nor do they claim to have been created by Royal charter or Act of Parliament. They claim corporate rights by virtue of the fact that they have been invested with rights and duties which cannot be properly discharged except on the assumption that they are corporate bodies. Thus a grant of land by the Crown to the men of Islington, *without saying to them and their successors*, rendering rent, was considered in law to have incorporated them for the purposes of the farm; for without such an incorporation, the grant could not be fully carried into effect (s).

(s) See Grant on Corporations p. 8. *cf. Chilton v. Corporation of London*. "A grant by the Crown of a *profit a prendre* out of Crown lands to the inhabitants of a parish constitute the inhabitants a corporation *quoad* the grant 7 Ch. D. p. 735.

We have seen how corporations come into being. We shall now see how they manage their affairs. A corporation, though an intangible entity, is constituted by one or more individuals. A corporation aggregate should have at least two members. But there is no limit at common law on the number. Members may be either elected or nominated, or they may become such by making certain payments or by the possession of some qualification or other. It can not be too well impressed that the members, though they constitute the corporation and though their interests may be closely bound up with those of the latter, are not the corporation. Corporately assembled, their acts are the acts of the corporation, but the members, in their individual capacity, apart from any statutory provisions, have no rights or liabilities in respect of the corporation.

General
conduct of
the affairs
of a corpo-
ration.

Membership of a corporation confer certain rights, privileges etc., on the members. But it also imposes duties, on the non-performance of which, the defaulting member may be expelled. The right of expelling a member or disfranchisement, as it has been called, is an incident of every corporation (*t*). It involves the total deprivation of all rights, interests and privileges which the member enjoyed as a corporator.

Power of
corpora-
tions over
members.

(*t*) Brice on the *Ultra Vires*, p. 32.

The right of disfranchisement may be exercised against a corporator not only for an offence against his duty as a corporator but also for a heinous or atrocious crime^(u). It is still a moot point whether this extensive power belongs to joint-stock limited companies. Mr. Brice holds that such corporations have no implied power to eject their members, however troublesome they may be, or however hostile their acts be to the welfare and prosperity of the whole body. But such a power might unquestionably be given by express provision in the constating instruments, as is indeed in reality done whenever the company or its directors are authorised to forfeit shares for non-payment of calls. But, even, where such power is given, it is not to be supposed that the courts will acquiesce in the corporations exercising the same. Thus, where the articles of association of a company provided that any member who brought or threatened to bring legal proceedings against the company or its directors would forfeit his shares, and a member brought an action for restraining the directors from acting upon a resolution, it was held that the clause was invalid and that the company had no power to forfeit shares.

It has been stated more than once that the corporators have no powers in their individual

(u) *Hope v. International Financial Society*, 4 C. D. 327.

capacity in respect of the corporation. But "the members in general meetings assembled constitute a forum supreme in all that relates to the internal arrangement, provided they keep within the corporate powers and act in subordination to the immutable statutes, if any, which form its constitution"(v). Such corporate meetings should be properly convened, accompanied by all the formalities. A corporator has the right to be present at every meeting of the corporation, unless such right does not exist by custom or has been taken away by the provisions in the constating instruments or bye-laws. On every occasion therefore that a meeting is to be called every member should be sent a notice. Omission to send such notice will render the whole proceedings, as between the particular member and the corporation, invalid (w). But a member, if he happens to be present, even though no notice has been sent to him, cannot afterwards set up the informality to invalidate the proceedings (x); nor, if he afterwards acquiesces in the proceedings of the meeting, can he repudiate the same (y). The notice

Power of
members in
meeting
assembled.

Notice.

(v) Brice on *Ultra Vires*, p. 32.

(w) *People's Ins. Co. v. Westcott*, 14 Gray 440. *Alexander v. Simpson*, 43 Ch. D. 139.

(x) *R. v. Chetwynd*, 7 B. & C., 695. *Re. British Sugar Refinin Co.*, 26 L. J. (Ch.) 369.

(y) *Turgand v. Marshall*, 4 Ch. 376; *Smallcombe v. Evans*, L. R. 3 H. L. 249.

should state the place, date and time of the meeting, unless there is some rule or custom, known to the members, which determine the same. It should also specify the business to be transacted at the meeting. No business other than what is specified in the notice can be validly transacted at the meeting for which the notice has been sent. But the transaction of business other than what is specified in the notice will not render the whole proceedings irregular (z).

Quorum.

The presence of a quorum is necessary to the validity of the proceedings of a corporate meeting. The quorum may be fixed by custom or the constating instruments. Where they are silent, the necessary quorum is constituted by the majority of the corporators. As Wills J. puts it: "The acts of a corporation are those of the major part of the corporators, corporately assembled. . . . This means that in the absence of special custom the major part must be present at that meeting and that of the majority, there must be a majority in favour of the act of resolution (a).

Majority.

The decision of the majority at a corporate meeting binds the minority and may be enforced against them by the court, unless

(z) *Graham v. Van Diemen's Land Co.*, 26 L. J. (Ex.) 73
Re Irrigation Co. of France—ex parte Fox, 6 Ch. 176.

(a) *Merchants of the Staple of England Co. v. Bank of England*, 21 Q. B. D. 160.

there be fraud (b). It should be noticed, however, that the acts or resolutions of the majority have no force if they are *ultra vires* and the minority is always entitled to relief in respect thereof.

Almost every corporation employs one or more persons to manage and look after its business or affairs. In the case of big trading or commercial concerns the necessity of employing such persons is obvious. The number of members may vary from half a dozen to a few hundreds and thousands. In the absence of any provisions to the contrary, they are all entitled to take part in the transaction of corporate affairs. But as a rule only certain matters are left to them; the rest of the business is done by a limited number of persons appointed specially by the corporation. It is those people who represent the corporation and who on its behalf enter into transactions with outsiders. They occupy the position of general agents and trustees.

Beside these, a corporation employs a number of persons who are entrusted with the transaction of its daily ordinary business e.g. managers, clerks and so forth. They are also agents of the corporation, but not general

(b) *Gosling v. Veley* (1847) 7 Q. B. 406. *Exeter and Crediton Ry. Co. v. Buller* (1847) 5 Ry. & Can. Cas. 211. *Society of Practical Knowledge v. Abbott*, 2 Beav 559.

agents. Their agency extends to the special business with which they are entrusted.

Corporate
capacities.

Corporations, as we have seen, at least statutory corporations, have only those powers with which they have been invested. They are created or exist for certain purposes, and apart from any prohibitions to the contrary, they enjoy all the powers necessary for accomplishing them. In other words a corporation can do all such things as fall within the scope of its objects as determined by the constituting instruments. But beside this express power, a corporation is considered to have power to do all such things as are reasonably incident to and may reasonably and properly be done under the main purpose, though they may not literally be within it (c). That such implied power exists has been affirmed more than once, though there may be difficulty in any particular case whether under the constituting instruments, a power is sought to be given or not.

Take the case of railway companies. As falling within the scope of its main object, it would have the express power of buying rolling stocks, laying down the lines, building station yards, employing men and so forth. It has been decided that it would have the further power of building and running hotels

(c) *Attorney-General v. G. E. Ry. Co.*, 5 App. Cas. 478.
Small v. Smith, 10 App. C. 119.

and restaurants for the use of its passengers (*d*), of running omnibuses (*e*), keeping bookstalls (*f*) and doing such other things as would conduce to the comfort of its passengers or would add to its own profits(*g*). It is plain that none of these falls within the main scope, yet they are allowed on the ground that they are incidental to the business of the railway company and are conducive to its proper development.

How far these deviations from the main business and enterprise will be allowed, it is very difficult to say. But as Mr. Brice says, "whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this; it may not under the pretence of fostering, entangle itself with which it has no legitimate concern(*h*)."

Thus a railway company is within its implied powers in erecting hotels or restaurants, but it is doubtful whether it can build bakeries for preparing its own bread etc. The former would be incidental to the carrying on of the main enterprise; but the latter would

(*d*) *Flanagan v. G., W. Ry. Co.*, 7 Eq. 116.

(*e*) *Shrewsbury, etc. Ry. Co. v. Stour Valley Ry. Co.*, 2 D. G. M. & G., 866. But see *A. G. v. London County Council*, (1902) A. C. 165.

(*f*) *Holmes v. Eastern Counties Ry. Co.*, 3 K. & J. 675.

(*g*) *Foster v. London, Chatham, Dover Rail Co.*, (1895) 1 Q. B. 711.

(*h*) Brice on *Ultra Vires* p. 150.

launch the company in an altogether different enterprise and would be, it is submitted, ruled *ultra vires*.

Though, as Romilly, M.R. remarks in *Gregory v. Patchett* (*j*), "it is very easy to point out many cases in which the right to interfere is unquestionable," there have been many cases where considerable difficulty has been felt in deciding whether an act or transaction could be justified under the implied powers of the corporation. The two cases of *South Wales Ry. Co. v. Redmond* (*k*) and *Colman v. Eastern Counties Ry. Co.* (*l*) are instructive on this point. In the former, the plaintiff company whose railway terminated at Milford Haven entered into a contract with the defendant for steam boats to run between that place and Ireland. It was held that the contract was not *ultra vires* and that the defendant having provided an unseaworthy vessel was liable in damages. In the latter, the plaintiff company agreed to grant a subsidy to a steam-packet company running in conjunction with their own line. It was held that they were a corporation for the purpose of making and maintaining the railway sanctioned by the Act of Incorporation and that the majority of the shareholders could

(*j*) 33 Beav. 595.

(*k*) (1861), 10 C. B. (N. S.) 675.

(*l*) 10 Beav. 1.

not validly grant a subsidy to the steam-packet company for the aforesaid purpose against the wishes of the minority (*m*).

While dealing with the capacities of corporations, we have to deal with the question of their capacity to acquire property. As has been already mentioned, according to the old common law of England, the right of corporate bodies to acquire property is unlimited. The power to acquire personal property to any amount, provided such acquisition be not *ultra vires*, still remains. But the power to acquire realty has been greatly curtailed by Mortmain and other statutes. Their effect has been that no landed property can be validly assured to a corporation, unless the latter has the power to acquire land under authority of a license from the crown or of a statute. If land is assured to a corporation not having such requisite authority, the crown or the mesne lord may enter and hold the land so assured.

Ultra Vires
acquisition
of property.

But even where the corporation has the requisite authority, its acquisition of property, (whether real or personal), must be sanctioned by its constating instruments as falling within the scope of its business or enterprise or

(*m*) See also *Stephens v. Mysore Reefs &c. Ltd.* (1902) 1 Ch. 745. *Pedlar v. Road Block Gold Mines &c. Ltd.*, (1905) 2 Ch. 427.

as incidental to it. That is to say, the doctrine of *ultra vires* applies as much to the acquisition of property as to any other corporate transaction. Take the case of a railway company. It cannot, under the Mortmain and other statutes, acquire any lands, unless it is authorised to do so, either by a general or a special statute or by a licence from the crown. But suppose it has the requisite authority. Even then the acquisition of lands, as also of the amount acquired, must fall within the scope of its business or enterprise. A railway company, for example, having power to buy lands, cannot buy more land there is necessary, nor in a locality where they would be of no use to it, or for the purpose of speculation. All these transactions would be *ultra vires* as outside the company's powers.

The above remarks apply to the acquisition of personalty as much as to realty. Here the corporation retains the old common law right of acquiring as an ordinary individual has. But all such acquisitions must be necessary to or incidental to its business or enterprise.

An interesting question arises here. Suppose property has been conveyed to a corporation which has not the authority to acquire it. What are the legal effects of the transaction? It may be laid down as a general rule that either party may rescind the transaction

and ask for a reconveyance, but that before such reconveyance is made, the property remains legally vested in the corporation (n).

As a general rule, transactions entered into by corporations (at any rate statutory corporations) will not be considered binding on any party as being *ultra vires*. This principle is not so rigorously applied as we might expect. The whole theory of implied powers of corporations is an illustration of the relaxation of this rule in practice. We have seen that corporations are allowed to deviate from the main line of their business or enterprise, provided such deviation is incidental to its main business or enterprise. But the courts have gone further. It has been held that if a corporation engage in a transaction which is duly authorised, and, as a consequence, becomes involved in transactions which are not authorised, such transactions will nevertheless be supported, if they (a) are necessitated by special circumstances; (b) could not have been foreseen; (c) are temporary and (d) matters of management. This appears to have been laid down in *Re Asiatic Banking Corporation*, *Royal Bank of India's case* (o).

(n) This proposition is laid down on the authority of Mr. Brice; see *Ultra Vires* p. 84 and the cases cited. See *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548. *G. E. Ry. Co. v. Turner*, (1872), 8 Ch. App. 149. *Overseers of Putney v. L. & S. W. Ry. Co.*, (1891) 1 Q. B. 440.

(o) L. R. 4 Ch. 252.

It should be noticed however that these *ultra vires* transaction will be supported only under the conditions set forth. If a corporation engages in a series of such transactions, it would not be allowed to claim exemption from the general rule. It is only when they are resorted to as temporary measures for escaping a difficulty which was not foreseen that the exemption will be allowed. Two cases cited by Brice illustrate the point. Thus in *Sackets Harbor Bank v. Lewis Company Bank* (p), it was held that the plaintiff company as also the defendant company, though prohibited by their charters from buying or selling any goods etc., was justified in receiving butter in lieu of a debt, when the debtor was unable to pay the same, and necessarily in selling the same, and here the inability of the debtor to pay the debt was unseen, selling of the butter was only a temporary expedient and a matter of management. Held accordingly that the transaction was binding.

On the other hand, in an American case cited by Brice "it was decided to be *ultra vires* of an insurance company to purchase and discount the bills of a policy holder in the hands of third parties with the intention of setting them off against his claim under his policy." Here the company entered into a series of *ultra*

vires transactions which could not be therefore supported (q).

Hitherto we have been dealing with the principles of *ultra vires*, the term being taken in its primary and secondary sense. But, as has been already stated, the term is used in a third sense: to mean acts which though *intra vires* the corporations are *ultra vires* the officials who are charged with the control and management of the business or affairs of the corporation. A corporation can not act by itself. It acts by and through certain persons, variously known as the governing body, the Board of Directors, councillors, commissioners etc. These persons are the agents of the corporation and can bind the latter in respect of dealings and transactions with third parties. But their agency is derived from, and limited by, the powers which are given to them expressly or by implication in the constating instruments. Acts which are within the powers of the corporate body but forbidden its officials by the constating instruments are *ultra vires* and are inoperative and do not bind the corporation. The reason for this is that the officials of the corporation, though they are agents of the latter, are merely special agents. They are authorised to engage in certain transactions for the

Corporation
not bound
by govern-
ing bodies
exceeding
their powers

(q) Brice, *Ultra Vires*, p. 178. *Strauss v. Eagle Ins. Co.*, 50 Ohio. 59.

purposes of the corporation, and, as is sometimes the case, expressly forbidden to engage in certain others. The outside world would thus have knowledge of the extent of their authority and should refrain from engaging in transactions beyond that authority. If they do so, they do it at their own risk and must look to the officials and not to the corporation. This is clearly brought out in a passage of Lord Wensleydale's judgment in the well-known case of *Earnest v. Nicholls*. "All persons must take notice of the deed (*i.e.* of settlement) and the provisions of the Act (*i.e.* 7 & 8 Vic. c. 110). If they do not choose to acquaint themselves with the powers of the directors, it is their own fault; and if they give credit to any unauthorised person, they must be contented to look to them only and not to the company at large. The stipulations of the deed which restrict and regulate their authority are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole company of shareholders, for whose protection the rules are made, unless they are strictly complied with"(*r*).

Of course, only those acts and transactions will be *ultra vires* which are forbidden or unauthorised by the constating instruments and which strangers may be expected to know

(*r*) 6 H. L. C. 419.

from a perusal of the instruments. If an act is not forbidden by the constating instruments and is within the powers of the corporation, it would not be judged *ultra vires* merely by reason of the fact that the officials had as a matter of fact been forbidden to do it. The court will not inquire into the *actual* authority of the officials but into their *apparent* authority so far as it can be gathered from the constating instruments. Thus a bye-law restraining the powers of directors is not binding upon strangers dealing with the company, provided they had no knowledge of the same, on the ground that such a bye-law forms no part of the memorandum and articles of association, which alone determined the powers of directors so far as strangers are concerned(s).

We have seen *ultra vires* acts or transactions, except under special circumstances, are invalid and will not be supported. Let us see what the full import of this is.

Effect of
ultra vires
acts or trans-
actions.

(1) If the act is still executory, the corporation as also the other party may repudiate it. Further if the officials of the corporation or the majority of the members propose to do an *ultra vires* act, they may be restrained from doing it by the minority or even by a single member.

(s) *Re Asiatic Banking Co.—Royal Bank of India's Case*, L. R. 4 Ch. 252. See per Sir C. J. Selwyn L. J. at p. 256-7 Sir G. M. Giffard, at p. 262.

(2) Let us suppose one of the parties to the transaction has done his part under the agreement, what is the position? The general rule is that the other party may repudiate the transaction even at this stage and that the party who has done his part under the agreement has no cause of action against the other party *under the agreement*, though, as we shall see presently, he may have a cause of action *in equity* for any benefits which the other party may have received from him.

(3) But let us go further and suppose that both parties to the transaction have done what they had promised. Can they reopen the whole transaction and ask to be reinstated in their original position? This is a difficult point and the law can not be stated with any precision. It has been said that "when *ultra vires* transactions have been completed," then as between parties to them and the corporation, the matter is absolutely ended for all purposes and no further claim can exist on the part of the one against the other." But what is meant by a "completed" transaction? (t).

Estoppel.

There is an interesting question which arises here, *viz.*, how can a corporation which has entered into an *ultra vires* transaction (or the other party to it), in view of the

(t) See Brice *Ultra Vires*, pp. 696—7.

general law of estoppel, take advantage of its incapacity and give evidence of the same to repudiate the transaction? The answer is furnished by Fry, L. J. in *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (u). "It is plain that the action cannot succeed on any ground of estoppel, for otherwise the defendants would be estoppel from denying that the stock was good. No corporate body can be bound by estoppel to do something beyond their powers (v)."

As a general rule, a corporation is not bound by *ultra vires* transactions and is entitled to repudiate them, provided they are not "completed." From this we are not to infer that it has no liability in respect of such transactions. If for example, the corporation has agreed to buy some property *ultra vires* its powers, it may refuse to buy. Again, if the property has passed, but the purchase money has not been paid, it may refuse to pay the purchase money. But while the corporation may thus repudiate *ultra vires* transactions, it may not at the same time appropriate any benefits under them. The equitable principle of accounting for benefits had and received has been applied to *ultra vires* transactions which have been executed by one or other of the

Liability in
ultra vires
engage-
ments.

(u) 18 Q. B. D. p. 714.

(v) Cf. *Overseers of Putney v. L. & S. W. Ry. Co.* per Bowen, L. J. (1891) 1 Q. B. p. 440.

parties, and the corporation (or the other party to the transaction) must account for any benefit it may have received under them.

Thus in *Burge's and Stock's case* (w), a life assurance company issued marine policies and received premiums payable on them. On a winding up, it was held that the claimants could not prove for losses on the policies, but that they were entitled to prove in respect of the premiums they had paid.

Similarly, in *Ex parte Key* (x), where a company took a lease under an *ultra vires* agreement, it was held that the lessor was entitled to prove in the winding up for the use and occupation by the company of the premises.

The principle of accounting for benefits had and received has been extended in various ways. It has been established by a series of decisions that *ultra vires* advances made to a corporation which are utilised for the purposes of the corporation, either for discharging its debts or liabilities or for meeting any of its other necessities, must be repaid to the extent they have been so utilised. This was the decision in *Re the German Mining-case* (y), the facts of which are as follows: a joint-stock company was formed in England for working

(w) *Re Phoenix Life Ass. Co.*, 2 J. & H. 441.

(x) *Burslem Paper Mills Co.*, 16 W. R. 1103.

(y) 4 De G. M. & G. 19.

mines in Germany. The deed of settlement provided that the capital should be £5000 and gave no power to the directors to raise money except by the creation of new shares. The capital that was paid up proved insufficient for the working of the mines. The wages of the miners being in arrears and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those and prevented the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guarantee from the bankers of the company not for the repayment of the debts but in carrying on the business of the company in its ordinary course and they afterwards repaid the bankers these advances. On a winding up, it was held (1) that the advances made by the shareholders to pay debts of the company might be set off by them with interest against a call. Turner L. J. observed as follows: "I think that the shareholders by whom these advances were made would, in common with the other shareholders, have been liable to the miners and creditors who were paid by means of the advances, and therefore that assuming the mines to have been properly carried on, upon which I have already observed, and shall presently observe more fully, and assuming the expenditure to have been properly incurred, (which upon the footing of the mines

being carried on is not disputed), the decision of the Master (*viz*, that the shareholders should be allowed to prove on their advances) ought to be upheld upon that ground alone" (2).

(2) That although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers—the directors being trustees were in that character entitled to indemnity from their *cestuique trustent* against expenses *bona-fide* incurred.

It will be observed that the grounds of the decision in (1) and (2) are different. In (1) the shareholders are held entitled to prove on the ground that the advance, made by them were expended in the payment of the debts of the company. In (2) the directors are held entitled to prove on the ground that as trustees they ought to be indemnified for any losses they might have been put to in carrying on the ordinary business of the company on behalf of the *cestuique trustents*.

The doctrine laid down here has been followed in a number of cases. In *Troup's case*(a) the directors of a company having no borrow-

(2) Per Turner L. J. 4 De G. M. & G. p. 41.

(a) *Re Electric Telegraph Co. of Ireland*, 29 Beav. 353.
See also *Hoare's Case*, 30 Beav. 225.

ing powers, being pressed for money by their contractor obtained for him on credit £2000 at a banker's upon their guarantee. The contractor afterwards agreed to abandon the plant etc. to the company on receiving £600 and being indemnified against the banker's claim. Subsequently to this, the secretary of the company, with the sanction of the directors, borrowed £500 in his own name for the company which was applied in paying the bankers and a judgment debt of the company. The company had the benefit of the plant. It was held that the secretary could recover from the company the money *bonafide* applied for its benefit with interest.

The principle underlying the decisions in these and other similar cases is well brought out in a passage in Lord Selbourne's judgment in *Cunliffe, Brooks & Co. v. Blackburn etc.*, which we shall quote here. "The test is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change in the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet and have had the

benefit of other people's money advanced to them shall not retain that benefit, so as in substance to make these other people pay their debts. I take that to be a principle sufficiently sound in equity : and if the result is that by the transaction which assumes the shape of an advance or loan, nothing is really added to the liabilities of the company, there has been no real transgression of the principles on which they are prohibited from borrowing" (b).

The principle of accounting for benefits had and received not only applies where the advances have been expended in the payment of already existing debts but also where they have been expended in the payment of debts which accrued subsequent to the advances (c).

Consistently with the principle enunciated above, it has been held that the creditors of a corporation whose advances have been utilised in the payment of its debts and have been devoted to its other necessities may not only prove for the advances they had made, but further that they may hold any property which may have been deposited with them by way of security for such part of the money advanced by them as has been applied in pay-

(b) *Cunliffe Brooks & Co. v. Blackburn, etc.*, 22 Ch. D. 61; 9 App. C. 857.

(c) *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. p. 155.

ment of the legitimate debts and liabilities of the corporation (c).

It should be clearly understood that in these *ultra vires* advances or loans to a corporation, the creditor can only recover to the extent the corporation has been benefited by them and no further, and secondly, that it is for the creditor to prove how far the corporation has actually been benefited by his advances (d).

Almost every corporation owns some property, though ownership of property is not essential to its existence. It can own and acquire personalty to any amount, provided it is not *ultra vires*. As regards realty, it can not own and acquire any unless it is properly authorised either by a license from the crown or by statute. The property is the exclusive property of the corporation and not of the corporators, although they may derive benefits from it (e). Being corporate property it can only be used for corporate purposes. It can not be made liable for any transaction which is *ultra vires* the corporation and the

Corporate
Funds.

(c) *Cunliffe, Brooks & Co. v. Blackburn*, etc., 22 Ch. D. 61.

(d) *Ex parte Williamson*, L. R. 5 Ch 309. *Re Cork & Youghal Ry. Co.* L. R. 4 Ch. 748. *Cunliffe Brooks & Co. v. Blackburn*, etc., 22 Ch. D. 61.

(e) *Rev. Arnand*, (1846), 9 Q. B. 806, 817, 818. *Society of Practical Knowledge v. Abbott*, (1840), 2 Beav. 559, per Lord Langdale M. R. at 564.

latter can always be restrained from misapplying the funds to *ultra vires* purposes (f).

(f) *Trevor v. Whitworth*, 12 App Cas. 409.

Colman v. Eastern Counties Ry. Co., 10 Beav. 1 ; 16 L. J. (Ch.) 73.

East Anglian Ry. Co. v. Eastern Counties' Ry. Co., 11 C. B. 775. The Court of Common Pleas stated :
"the funds can only be applied for the purposes directed and provided for by statute"

LECTURE VII.

Municipalities.

The history of municipalities in India goes back to the early days of the East India Company. It is marked by two stages: (1) of chartered, and (2) of statutory municipalities. Madras enjoys the honour of being the oldest municipality in this country. The Kings of England have from very early times exercised the prerogative right of conferring corporate rights on towns and boroughs (a). This right can be delegated. In 1689, James II authorised the East India Company to establish a municipality at Madras. In pursuance of this delegated right the Company issued a charter establishing in that place a municipality and a Mayor's Court. It was provided that the new municipality should consist of a Mayor, twelve Aldermen and sixty or more burgesses. The Mayor and the Aldermen could levy taxes to defray the expenses incurred in building a convenient town-house, etc. . . . "for the greater solemnity and to attract respect and reverence from the common people." The charter provided that the Mayor should always have carried before him when he went to the guild-hall or any other public place, two gilt silver

History of
Municipal-
ities in
India.

(a) See Grant on Corporation pp. 16-18. Halsbury's Laws of England, Vol. 8, pp. 314-15.

maces, and upon such occasions, the Mayor and the Aldermen might "wear scarlet sergeworn all made after one form or fashion, such as shall be thought most convenient for the hot country. They were also "to have and for ever enjoy the honour and privilege of having rundelloes and kattysols borne over them when they walk or ride abroad, on these necessary occasions within the limits of the said corporation."

In 1726, a Royal charter was issued re-establishing the municipality of Madras and establishing municipalities at Bombay and Calcutta. It directed "that there shall be, for ever hereafter and within the said town or factory of Madraspatam aforesaid, one body politic and corporate, by the name of Mayor and Aldermen of Madraspatam and that such body politic and corporate shall consist of a Mayor and nine Aldermen, and that the said body corporate, by name aforesaid, shall have perpetual succession, and shall and may be Person able and capable in law to sue and be sued in any courts and causes whatsoever : and shall and may have a common seal, for the benefits and affairs of the said corporation, which common seal, they and their successors may break and change at their pleasure." Similar provisions were made for the municipalities established in Calcutta and Bombay. It may be noticed in passing that

the Mayor and the Aldermen in addition to their municipal functions were given the judicial powers and duties of a Court of Record and of Oyer and Terminer.

In 1753, the Company obtained a fresh charter in place of the old one which they surrendered. The new charter, among other things, re-established the municipalities at Madras, Calcutta and Bombay, preserving their old constitutions.

Our modern municipalities, whether in the Presidency towns or elsewhere are all statutory bodies. The municipalities in the three Presidency towns of Calcutta, Bombay and Madras are each governed by a special Act. All other municipalities have been established and are governed by one or other of the District Municipalities' Acts that have been passed for the various provinces of India. As the law on the subject of municipal corporation is almost uniform over the whole of British India, we shall not go into each of the Acts that have been enacted, but shall mainly confine ourselves to the Bengal Municipal Act of 1884 as amended by subsequent enactments.

Modern municipalities in India are statutory bodies.

Before we come to deal with questions relating to matters of municipal administration, we shall briefly discuss the relation of municipal bodies (1) to the Government of this

Relation of municipalities to Government.

country and (2) to its courts of law. The municipalities, though they are allowed some amount of independence and initiative, are not wholly independent bodies. From their very inception, they are largely controlled by the Local Government. First, in all municipal bodies, the members, commissioners as they are called, are either partly or may be wholly appointed by the Local Government (c); secondly, it may remove any commissioner for misconduct (d); thirdly, it is entitled to call for and inspect their books (e); fourthly, it is authorised to make rules, which have the force of law, intended to control the municipalities (f); fifthly, in some cases, its sanction or confirmation is necessary to complete the act or the transaction (g); and sixthly and lastly, it may dissolve any municipality by superseding the commissioners (h).

Relation of
municipal-
ities to
courts of
law.

We now come to deal with the relation of municipalities to our courts of law. The various Acts of legislature, which have established and are meant to govern municipalities, have charged the latter with the performance of certain duties and invested them with certain powers. In discharging their duties and

(c) Secs. 14 and 16 of Act III of 1884 (B.C.)

(d) Sec. 19 *ibid.*

(e) Sec. 62 *ibid.*

(f) Secs. 15 and 69(b) *ibid.*

(g) Secs. 59, 85, 158 *ibid.*

(h) Sec. 65 *ibid.*

exercising their powers they must keep within the limits that have been prescribed. The courts in dealing with them treat them, as a rule, more generously than other corporate bodies. For the purpose of enabling them to perform their public duties unimpeded, the courts have placed a more liberal construction on the statutory rights and duties of municipal bodies. But their acts are not outside the jurisdiction of courts of law. In a case reported in 19 Weekly Reporter, p. 309. "probably the first case of its kind" one of the defences taken by the defendant municipality was to the effect that the courts had no jurisdiction to interfere with the actions of public bodies. The Calcutta High Court held that "municipal as well as other public bodies are within the restraining jurisdiction of the civil courts which are competent to inquire into and control the actions of public bodies where they have acted in excess or contradiction of the powers conferred upon them." In other words, the doctrine of *Ultra Vires* applies to municipalities as much as to any other corporate body. Even where the decisions of municipalities acting in a quasi-judicial capacity in certain matters are declared by the legislature to be final, the courts may inquire whether in coming to their decisions, they acted within their powers in conformity to the provisions prescribed by law. As Mukherji J. puts it in a recent case: "In these

Doctrine
ultra vires
applies to
municipal
bodies.

cases it was pointed out that sec. 116 does not take away the jurisdiction of the civil court in a case in which it is alleged and established that the assessment the propriety of which is in controversy is open to objection on the ground that it is *ultra vires*; in other words, it is only when the action of the municipality has been exercised in conformity with the powers conferred upon it by the Act, that the civil court has no authority to interfere. The distinction is well founded on principle. A corporation which is invested with authority to assess taxes, is really invested with a *quasi-judicial* power, and although its action when taken in conformity with the provisions of the law which created the authority may not be liable to challenge in the civil courts, it does not enjoy a similar immunity when that action can be challenged on the ground that it has been taken either in excess of or in contravention of the powers conferred upon it by the statute.”(i)

It should be borne in mind however that where the municipality while acting within its powers has come to a certain decision, that decision can not be impugned in a civil court on the ground that it was wrong and should not have been arrived at. The municipality has been authorised by the legislature to decide and act in various matters that have been placed

(i) *Chairman of Giridhi Municipality v. Sures Chandra Mozumdar*, 12 C. W. N., p. 709 (712).

under their charge. A court of law cannot take its place and decide in a particular case what should be done, provided the municipality has come to a decision in conformity with the provisions of law. From this it would follow that all questions of relative necessity, advantage or facility being questions of municipal detail, the civil court will not seek to regulate them by challenging the decisions and acts of municipal bodies.

Thus in *F. W. Duke v. Rameswar Malia (j)*, where the defendant contended that the municipality had no power to order the opening of a bustee-road on the ground that such an opening was not necessary, the court held that they could not enter into the question of necessity. In that case, Banerji J. observed as follows: "There can be no doubt that the civil courts have jurisdiction to try the question whether the municipality had been acting within the limits of statutory power.....But then it does not follow that the civil courts have jurisdiction to try the question whether the municipality, when it was acting within the limit of its statutory power, was right in its judgment that a certain road should be opened." This well-known principle of law has been confirmed in a somewhat

Civil courts have no jurisdiction when municipalities are acting within their powers.

(j) I. L. R. 26 Cal. 811.

recent case (*k*) decided by the House of Lords which laid down unanimously the proposition that municipalities must use their statutory powers *bonafide* and reasonably, and if they so act their discretion as to the mode of acting can not be challenged.

The municipality should then act *bonafide* and reasonably, and above all, in conformity to law, if it wishes to remain outside the jurisdiction of civil courts. An act may be perfectly *bonafide* and yet is liable to be challenged on the ground that it goes beyond the powers of the municipal body. The latter may be actuated by the desire to do some public good, as also by the belief that it has the power to do the act in question. "But that does not affect the question before the court, for whatever the motive, it would be the duty of the court to restrain the commissioner if his acts are in excess of his powers" (*l*).

Constitution of municipal bodies; their powers and duties.

We now proceed to discuss the constitution of municipal bodies, and their powers and duties. Our treatment of the subject will be somewhat general, avoiding details as far as possible. Our primary object would be, not so much as to give an exhaustive catalogue of the powers and duties of these bodies as to

(*k*) *Mayor, &c. of Westminster v. London & North Western Railway Co.* (1905) A. C. p. 426.

(*l*) *Chabildas Lalubhai v. Municipal Commissioner of Bombay*, 8 Bom. H. C. Rep. 85 (O. C. J.)

attempt an exposition of the exact nature and extent of these powers and duties in the light of reported cases.

And first as to their constitution : a municipal body in a district town is composed of a number of commissioners and a chairman, elected or appointed, who also enjoys the rights and privileges of a commissioner (*m*). The number of commissioners in any municipality is fixed by the Local Government, but it may not be more than thirty or less than nine (*n*). In some municipalites, all the members are appointed by the Local Government (*o*) ; in others, a certain proportion of them is elected by male persons residing within the limits of the municipality (*p*) and having certain pecuniary, educational or professional qualifications, the rest is appointed by the Local Government. The commissioners remain in office for a definite period, *e.g.* in Bengal for three years from the date of their appointment or election. In some municipalities, the commissioners are entitled to elect a chairman from among themselves ; in other, he is appointed by the Local Government by name or official designation (*q*). The commissioners are also entitled to

(*m*) Sec. 24, Act III of 1884 (B. C.)

(*n*) Sec. 13 *ibid.*

(*o*) Sec. 17 *ibid.*

(*p*) Sec. 14 *ibid.*

(*q*) Sec. 23 *ibid.*

elect one of their own number to be vice-chairman (r).

The Local Government exercises great control over the constitution of municipal bodies. It is empowered by the legislature to make rules for the purpose of the election of the commissioners, not inconsistent with the Act and subject to certain provisos(s). Secondly, it may, if it thinks fit, on the recommendation of the commissioners at a meeting remove any commissioner, appointed or elected, if such commissioner has been guilty of misconduct in the discharge of his duties or of any disgraceful conduct(t). The wording of the section makes it clear that the Local Government would not be justified in removing a commissioner unless the fact of misconduct has been ascertained, and that if that fact is not proved there is no ground on which the Local Government can exercise its decision. The aggrieved commissioner is entitled to go to the civil court and ask the Local Government to prove the misconduct alleged against him(u).

Thirdly, the Commissioner of the Division may remove any commissioner—

(a) if he refuses to act or becomes incapable of acting or is declared

(r) Sec. 25 *ibid.*

(s) Sec. 15 *ibid.*

(t) Sec. 19 *ibid.*

(u) *Vijaya Ragava v. Secretary of State for India*,
I. L. R. 7 Mad. 466.

insolvent or is convicted of any non-bailable offence ; or

(b) if he has been declared by notification to be disqualified for employment in the public service ; or.

(c) if he absents himself from six consecutive meetings of the commissioners without having obtained permission from the commissioners at a meeting ; or

(d) if, in the judgment of the Commissioner of the Division, to be recorded in writing, he has become disqualified to continue under sec 57 of the Act (v).

A right of appeal to the Local Government is given to the commissioner so removed.

Fourthly and lastly, the Local Government, as we have already pointed out, may make an order declaring the commissioners of any municipality to be incompetent, or in default, or to have exceeded or abused their powers and supersede them for a definite period (w). When such an order has been made the commissioners shall, as from the date of that order, vacate their office, and all their powers and duties shall be exercised and performed by the Local Government, and all property

(v) Sec. 20 *ibid.*

(w) Sec. 65 *ibid.*

vested in the commissioners shall vest in the Local Government. The latter shall be in power in place of the commissioners for the period prescribed in the order, after the expiration of which steps shall be taken for the election or appointment of the commissioners.

Proprietary
rights of
municipali-
ties.

For the purpose of enabling municipal bodies to discharge their duties consistently with their powers, the legislature has vested in them certain proprietary rights. Sec. 30 of the Bengal Municipal Act (1884) as subsequently amended enacts as follows :

“All roads, including the soil, and all bridges, tanks, ghats, wells, channels, and drains in any municipality (not being private property and not being maintained by Government at the public expense) now existing or which shall hereafter be made, and the pavements, stones and other materials thereof, and all the erections, materials, implements and other things provided therefor, shall vest in, and belong to, the commissioners. .

“But the Local Government may, from time to time, by notification, exclude any road, bridge, or drain from the operations of this Act or of any specified section of this Act, and may cancel such notification wholly or in part :

“Provided that, if the cost of the construction of the work shall have been paid from the Municipal Fund, such work shall not be

excluded from the operation of this Act or of any specified section of this Act without the consent of the Commissioners at a meeting."

There have been numerous decisions in England and in India on the question of the nature of the proprietary right in roads, etc., which are vested in municipal bodies. "The conclusion to be derived from the authorities seems to be this ; all the stratum of air above the surface and all the stratum of soil below the surface which, in any reasonable sense, can be required for the purposes of the street, as street, vest and belong to the local authority"(x). In the section that we have quoted above, the words "including the soil" did not appear in the Act of 1884 but they have been introduced by the amending Act of 1894, (sec. 22). In 1886, in a case against the Municipality of Naihati, it was laid down that the word *roads* comprised only the surface of the roads without any depth, that it did not include the sub-soil beneath the road, and that the subsoil did not belong to the municipality but belonged to the Zemindar in whose estate the road was situated. It was further decided in that case that the Act was not intended to deprive any person of any private right that he might have in the land used as a public road or to vest that right in the municipality ; and that when the

(x) *Finchley Electric Light Company v. Finchley Urban District Council*, L. R. (1903) 1 Ch. 437, at p. 441. ;

land was no longer required for a public road, the owner was entitled to have it (y).

This decision followed the decision in the English case of *Vestry of St. Mary Newington v. Jacobs*, reported in (1872) L. R. 7 Q. B. p. 47. But the interpretation that the judges in this case put on the word "street" corresponding to the word "road" in our Act was found to be too narrow, and accordingly in 1878, in the well-known case of *Coverdale v. Charlton* (z) the courts put a somewhat larger interpretation so as to include not only the bare surface of the street (or road) but also as much depth below the surface as is essential to the making, maintenance, occupation and exclusive possession of the street for the use of the public, and as the municipality might require for the doing of all those things that are commonly done to or under the streets (or roads).

The Amending Act of 1894 has incorporated this interpretation of the word "street"

(y) *Chairman of Naihati Municipality v. Kisori Lal Goswami* I. L. R. 13 Cal. 171.

See also *Modhu Sudan Kundu v. Promoda Nath Ray*, I. L. R. 20 Cal. 732; *Nihal Chand v. Asmat Ali Khan*, I. L. R. 7 All. p. 362; *Mubarak Shah v. Toofany*, I. L. R. 4 Cal. p. 206.

(z) (1878) L. R. 4 Q. B. D. 104.

See also *Burgess v. Northwich Local Board*, 6 Q. B. D. 264. *Wandsworth Board of Works v. United Telephone Co.*, 13 Q. B. D. 904. *R. v. Kupers etc. of County of London etc.*, 25 Q. B. D. 362. *Finchley Electric Light Company v. Finchley Urban District Council*, L. R. (1903) 1 Ch. 437.

by introducing the words "including the soil." In a case decided by the Madras High Court in 1901, the amendment was recognised and given effect to, and the Indian law on the point was brought into tune with English decision(a). At present it is quite clear that under the Act, the municipality enjoys a right in the subsoil of the road, etc., vested in them, not of course down to the middle of the earth, but in as much of it as is necessary for carrying out the purposes of the Act.

There is another question which has arisen in this connection, *viz.* whether the municipality is vested not only with the subsoil, but also with the column of space over the roads. *Coverdale v. Charlton* (b) decided that the word "street" probably meant and included not merely the surface but so much above it also as was requisite or appropriate for the preservation of the road and for the usual and intended purposes. This view has been followed here. In *Nagar Valab Narsi v. Municipality of Dhandhuka* (c), the Bombay High Court decided that if the column of space standing over the street were occupied by projectors, the interception of air and light would greatly impair the use of the street as street and that so far therefore the

(a) *S. Sundaram Aiyar v. The Madura Municipal Council*,
I. L. R. 25 Mad. p. 635.

(b) (1878) L. R. 4 Q. B. D. 104.

(c) I. L. R. 12 Bom. p. 490.

column of space is vested as part of its property in the municipality.

Nature of
this right.

Having determined the extent of the proprietary right of municipal bodies in roads etc., we shall now proceed to determine the precise nature of this right. The section we have quoted says all roads etc.,.....“shall vest in and belong to the Commissioners.” Does this confer the absolute right of ownership on municipal bodies? It was contended in *R. v. Brojo Nath De (d)*, which was decided in 1877 under Sec. 10 of Bengal Act. III of 1864, where the same words as above occur, that since public highways became vested in and belonged to the commissioners, the latter could dispose of this property in any way they pleased, provided they did so for the purposes of the Act. The High Court of Calcutta overruled the contention and held that the municipal commissioners did not have any such large power and that neither they nor *a fortiori* their vice-chairman could stop up or divert public highways.

This view is in conformity with the decisions of English courts. In the case of *Coverdale v. Charlton, (e)* the broad proposition of law was laid down *viz.* “The Boards’ property in the street is not general property

(d) I. L. R. 2 Cal. 425.

(e) 1878, L. R. 4 Q. B. D. 104.

or a species of property known to English common law, but is a special property created by statute and vested in the Board for public purposes and it is limited by reference to the period during which the street is used for the particular purpose of a highway and that period ceases when that purpose has ceased."

The question as regards the nature and extent of the proprietary rights of public bodies was gone into at some length in the Madras case which we have just referred to. Bhashyam Ayyangar J. after having discussed the leading cases in England and India summed up his views as follows: "The conclusion to be drawn from the English case-law is that what is vested in urban authorities under statutes similar to the District Municipalities' Act is not the land over which the street is formed, but the street *qua* street, and that the property in the street thus created in a municipal council is not general property or a species of property known to the common law, but a special property vested by statute and vested in a corporate body for public purposes, that such property as it has in the street continues only so long as the street is a highway and that when it ceases to be a highway by being excluded by notification of Government under sec. 23 of Act. II of 1884, or by being legally stopped up or diverted or by the operation of

limitation (assuming that by such an operation, the highway can be extinguished) (the interest of the corporate body determines, and that the clauses directing or authorising the corporate body to sell have reference only to property absolutely vested in it, but as to property in which its interest ceases it has nothing to sell" (f).

Power of
municipal
bodies to
acquire
lands.

Beside the properties which are vested in a municipal body by the operation of the Act, it may, for the purposes of the Act, acquire landed properties, freehold or leasehold, by agreement with private owners (g). It may also make a compulsory purchase of land through the Local Government acting under the provisions of the Land Acquisition Act, 1894 (h). Such purchase must be for the purposes of the Act; otherwise, the municipality may be restrained by an injunction from paying for the land in question out of its funds. The declaration made by the Local Government under sec. 6 of the Land Acquisition Act, 1894, to the effect that the land going to be acquired is needed for a public purpose is conclusive evidence that the land was really needed for such purpose. But this does not in a suit brought against the municipality for restraining it from paying for

(f) *S. Sundaram Aiyar v. The Madura Municipal Council*, I. L. R. 25 Mad. 635 at p. 647.

(g) Sec. 34, Act III of 1884 (B. C.)

(h) See 35 *ibid.*

the land out of its funds oust the jurisdiction of the civil courts to enquire whether it is really needed for the purposes of the Act. The courts, however, will not interfere with the discretion of the municipality in deciding whether the acquisition of the land in question is needed for the purposes of the Act, if it has acted properly and reasonably (i).

Beside these landed properties, the legislature has vested in municipalities certain funds. Sec. 67 of the Bengal Municipal Act, (III of 1884) enacts as follows :—

Municipal
funds.

“All sums received by the Commissioners, and all fines paid or levied in any municipality under this Act, and all other sums which, under the sanction of Government, may be transferred to the Commissioners, shall constitute a fund which shall be called the Municipal Fund, and shall, together with all property of every nature or kind whatsoever, which may become vested in the Commissioners, be under their control and shall be held by them in trust for the purposes of this Act.”

The municipality, it is clear, holds its funds and properties in trust for the purposes of the Act. Accordingly it cannot employ the same or proceeds of the same for any purpose not contemplated by the Act. As we have

(i) *Sastri Ram Chandra v. The Ahmedabad Municipality*, I. L. R. 24 Bom. p. 600, per Ranade J. at p. 604 & at p. 606.

already seen in the case last cited, the civil courts will not seek to interfere with the discretion of the municipality in deciding what is necessary for the purposes of the Act. "All questions of relative necessity, advantage, or facility are questions of municipal detail, and it is not within the province of a Civil Court to regulate their details (j)."

But in a case of clear misapplication of funds, the court may stop it by an injunction. Thus in *Vaman Tatyaji v. Municipality of Sholapur(k)*, it was held that the municipal funds could not be employed for the purpose of keeping a band, and accordingly an injunction was granted restraining the municipality from employing its funds for such purpose.

Power of
municipal
bodies to
enter into
contracts.

The power to enter into contracts is one of the common law incidents of corporate bodies. Our municipalities enjoy this power under certain statutory restrictions. Sec. 37 of the Act enacts as follows:—

"The Commissioners may enter into and perform any contract necessary for the purposes of this Act.

"Every contract made on behalf of the Commissioners of a municipality in respect of

(j) *Sastri Ram Chandra v. The Ahmedabad Municipality*.
I. L. R. 24 Bom p. 600 at p. 606.

(k) I. L. R. 22 Bom. 646.

See also *Attorney-General v. Aspinall*, 2 My. & Cr. 613;
Attorney-General v. Mayor of Poole, 4 My. & Cr. 17.

any sum exceeding five hundred rupees, or which shall involve a value exceeding five hundred rupees, shall be sanctioned by the Commissioners at meeting, and shall be in writing and signed by at least two of the Commissioners, one of whom shall be the Chairman or Vice-Chairman, and shall be sealed with the common seal of the Commissioners.

“Unless so executed, such contract shall not be binding on the Commissioners.”

The section lays down, first, that the contracts entered into by municipal bodies must be necessary for the purposes of the Act; otherwise, they would be *ultra vires*. Secondly, that contracts in respect of any sum exceeding five hundred rupees, or which will involve a value exceeding five hundred rupees shall be accompanied by certain formalities. Our courts, following English decisions, have construed these formalities as imperative and have required substantial compliance with them. In the absence of such compliance the contract is void. The courts have gone so far as to exempt the municipality from any liability whatsoever, even in respect of what has been done under the contract, on the ground that the provisions laid down by the legislature have not been observed. Thus in *Radhakissen Das v. The Municipal Board of Benares* (1), the court

(1) *Radhakissen Das v. The Municipal Board of Benares*, I. L. R. 27 All. p. 592.

held that where a contract had not been entered into in the manner provided by the legislature, no suit could be maintained in respect thereof, even though there had been part performance of the contract and the plaintiff was claiming merely for the value of work done and of materials supplied, notwithstanding the provisions of sections 65, 70 and 72 of the Indian Contract Act.

Power of
municipal
bodies to
impose
taxes.

Of the many powers that have been conferred on municipal bodies, the most important, as well as the most formidable, is power to tax those who are within their jurisdiction. We have already seen that the charter of the East India Company establishing the municipality at Madras authorised the Mayor and Aldermen to levy taxes for certain purposes. Our modern municipalities are vested with a similar power by the legislature which has to be exercised under certain restrictions.

See also *Ramaswamy Chetti v. The Municipal Council of Tanjore*, I. L. R. 29 Mad. 360.

Ahmedbad Municipality v. Submanji I. L. R. 27 Bom. 618.

Chairman South Barrackpore Municipality v. Amulyanath Chatterji I. L. R. 34 Cal. 1030.

But see *Abaji Sitaram v. Trimbuk Municipality*, I. L. R. 28 Bom. 66, when Jenkins C. J. observes that in a case of executed consideration, action will lie though the formality of sealing has not been observed.

See also the following English cases :—

Young & Co. v. Mayor of Royal Limington Spa L. R. 8 Q. B. D. 579 ; (1883) L. R. 8 App. Cas. 517.

British Insulated Wire Company Ltd. v. The Prescott Urban District Council, (1895) L. R. 2 Q. B. 463.

The power to levy rates, taxes, tolls, customs, etc. from the king's subjects is not one of the ordinary incidents of corporate bodies. Whatever may be the powers individually possessed by corporations which exist at common law, or by prescription or implication, there is no doubt that statutory corporations can exercise no such power as levying of rates and taxes, etc., unless authorised by statute to do so; and that "if a corporation established by Parliament is empowered by statute to impose certain tolls upon those who make use of its property, etc., it cannot impose any further tax upon them and claim anything beyond that which the statute empowers it to claim (*m*)."

Sections 85 and 86 enact as follows :

"The Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notice shall have been given, and with the sanction of the Local Government, impose, within the limits of the municipality, one or other or both of the following taxes:—

- (a) a tax upon persons occupying holdings within the municipality according to their circumstances and property within the municipality:

(*m*) Grant on "The Law of Corporations" p. 7.

Provided that the amount assessed upon any person in respect of the occupation of any holding shall not be more than eighty-four rupees per annum ; or

(b) a rate on the annual value of holdings situated within the municipality :

Provided that such rate shall not exceed seven and a half per centum on the annual value of such holdings, except within the municipalities of Howrah, Patna, Dacca, and Darjeeling, in which it shall not exceed ten per centum on such annual value ; and provided also that no rate shall be imposed on any holding of which the annual value is less than six rupees :

Provided that both the taxes shall not be in force at the same time in the same ward."

"The Commissioners may, from time to time at a meeting convened as aforesaid, and with the sanction of the Local Government order that the following tax, fee, tolls, and rates, or any of them, be levied within the limits of the municipality in addition to either of the taxes mentioned in the last preceding section—

- (a) a tax on carriages, horses and other animals named in the fifth schedule ;
- (b) a fee on the registration of carts ;
- (c) tolls on ferries and (subject to the provisions of sections 158 and 159) tolls upon bridges and metalled roads ;

(*a*) a water-rate not exceeding seven and a half per centum on the annual value of holdings when the houses and lands are situated in streets supplied with water, and not exceeding six per centum when the houses and lands are situated in streets not so supplied ;

(*e*) a lighting rate not exceeding three per centum on such annual value ;

(*f*) a fee for the cleansing of latrines ;

Provided that the taxes mentioned in clauses (*a*), (*e*) and (*f*) shall not be leived in any municipality unless the provisions of Part VII in respect of clause (*a*) or of Part VIII in respect of clause (*e*) or of Part IX in respect of clause (*f*), shall have been extended, wholly or partly, to such municipality in the manner hereinafter provided."

The sections empower the commissioners (1) to levy a tax on occupiers of holdings within the municipality according to their circumstances and property within the municipality ; (2) to levy a rate on the annual value of holdings within the municipality ; and (3) to levy certain taxes, fees and tolls on carriages, horses, carts, bridges, etc., and certain rates to defray the expenses of water and light supply. Their power, it should be observed, is to be exercised subject to the sanction of

the Local Government and to the provisions, already mentioned, as also strictly in conformity with the procedure laid down. It is a well established principle that in construing these provisions which invest the commissioners with power to tax the subject, the courts will scrutinise them most closely and construe them with the utmost strictness (n). In levying any rates, taxes, etc., the commissioners are bound to observe the necessary formalities. Where there has been any omission, the tax is illegal and no one is bound to pay it. This was laid down in *Leman v. Damodaraya* (o). The act of its own force creates neither any taxes nor any tax-payers, but provides that if the proper measures are taken, both may come into existence, and empowers the commissioners to take these measures. There is no provision for taxing at all otherwise than by prescribing the machinery. If it does not exist, there can be no tax at all; nor unless it is applied can there be any debt due from any person.

This has been followed in *Joshi Kalidas Sevakram v. The Dakor Town Municipality* (p). In this case, the municipality, under the powers

(n) See *Dwarka Nath Dutt v. Addya Sundari Mittra and others*, I. L. R. 21 Cal. 319, per Beverley J. at p. 325.

(o) I. L. R. 1 Mad. 158.

(p) I. L. R. 7 Bom. 399.

The Municipality of Sholapur v. Sholapur Spinning and Weaving Co., I. L. R. 20 Bom. 732.

conferred upon them by Bombay Act VI of 1873, convened a meeting at which it was resolved to impose a house-tax. Notice of the meeting was not served on three of the commissioners and no notice specifying the business to be transacted therein was posted up at the *Kachari* as required by sec. 11, cl. 1 of the Act. The plaintiff sent a notice to the municipality impeaching the legality of the tax. He paid the tax and then sued for a refund. It was held that the provisions of sec. 11, cl. 1, as to notice of meeting are not directory, but obligatory, and that notice to all the commissioners of the meeting at which the taxing resolution was passed being a material part of the machinery provided by the Act for imposing a legal tax was a condition precedent to the validity of of that tax. The tax was consequently declared illegal, notwithstanding that the tax had been sanctioned by the Local Government.

But it is for the person who alleges illegality to prove that the regular procedure for imposing a tax has not been followed. In the absence of such proof the court will presume that the municipality has used the regular procedure and that the common course of business has been followed in the case in question.

Along with the power of taxation, the municipality possesses certain powers of a *quasi-judicial* character which authorise it to determine the amount of tax etc., that may be

levied in a particular case (*q*). The Act makes the decisions of the municipality on questions of assessment final, except in regard to certain matters which we shall notice presently where the civil court is entitled to interfere and set aside the assessment made by the municipal authorities. Sections 113-116 provide as follows :

“ Any person who is dissatisfied with the amount assessed upon him or with the valuation or rating of any holding,

or who disputes his occupation of any holding or his liability to be assessed or rated,

may apply to the Commissioners to review the amount of assessment, valuation, or rating or to exempt him from the assessment or rate (*r*).

“ Every application presented under the last preceding section shall be heard and determined by not less than three Commissioners, who shall be appointed in that behalf by the Commissioners at a meeting. The Commissioners so appointed, after taking such evidence and making such enquiries as they may deem necessary, may pass such order as they shall think fit in respect of such application.

“ The decision of such Commissioners, or of a majority thereof, in such cases shall be final ” (*s*).

(*q*) Sec. 87 to 115, Bengal Act III of 1884.

(*r*) Sec. 113, *ibid*.

(*s*) Sec. 114, *ibid*.

"Unless good cause shall be shown to the satisfaction of such Commissioners for extending the time allowed, and save as is otherwise expressly provided in this Act, no such application shall be received after the expiration of one month from the date of publication of the notice required by section 112 relating to the list containing the assessment, valuation or rating in respect of which the application is made, or after the expiration of fifteen days from the date of service of the first notice of demand for payment at the rate in respect of which the application is made, whichever period shall last expire (t)."

"No objection shall be taken to any assessment or rating in any other manner than in this Act is provided (u).

There has been a large number of decisions on the subject of the powers of assessment, valuation and rating possessed by municipal bodies and on the jurisdiction of civil courts to inquire into their validity. The law on this point has been throughout uniform and consistent. It may be enunciated thus: a civil court is bound to accept as conclusive the assessment, valuation or rating made by the municipality, being the only authority on whom the power of making the assessment etc., has been placed

(t) Sec. 115, *ibid.*

(u) Sec. 116, *ibid.*

by law and cannot substitute for that assessment etc., one made by itself; and further it ought not to interfere with the municipal assessment etc., unless the rules prescribed by the law for making the assessment etc., have been broken or unless there has been *malafides* or manifest error (v). The question now is, what are the circumstances in which the civil court is entitled to interfere with the decisions of municipal bodies on questions of assessment, valuation or rating. They are:—

- (1) where there is no legal tax to pay;
- (2) where there is no liability to pay;
- (3) where the assessment, valuation or rating has been made on wrong basis or principle.

Where
there is no
legal tax to
pay.

We have already considered this point in the two cases we have cited—*Leman v. Damodaraya* (w) and *Joshi Kalidas Sevakaram v. Dakor Town Municipality* (x). The Act by itself does not create any tax but it authorises the commissioners to levy a tax by taking certain measures. If they fail to take the necessary measures and yet proceed to levy, any person can refuse to

(v) See *Morar v. Borsad Municipality*, I. L. R. 24 Bom. 607.

(w) *Kasandas Raghunathdas v. Ankleshwar Municipality*, I. L. R. 26 Bom. 294.

(x) *Manessur Das v. Municipality of Chapra*, I. L. R. 1 Cal. 409.

(w) I. L. R. 1 Mad. 158.

(x) I. L. R. 7 Bom. 399.

pay on the ground that there is no legal tax to pay. When the refusal is made on this ground, the court as we have seen, is entitled to enquire into the validity of the tax and on being satisfied that the tax is not validly imposed, may set aside the assessment or valuation or rating.

The courts have always distinguished between two questions, first, the question as regards the *amount* of assessment, rating or valuation and secondly, the question as regards the *liability* to pay. When the person assessed disputes the *amount* of the assessment, valuation or rating, he has no other remedy except what is provided by sections 113-115 of the Act. But where the person assessed disputes his *liability* to pay, then notwithstanding the above mentioned sections and sec. 116, the court will inquire into the question of his liability. The municipality cannot get hold of any person they please and assess him, and then plead under section 116 of the Act want of jurisdiction of the civil court to question its conduct. As the section was originally framed it was somewhat ambiguous and was as follows: "No objection shall be taken to any assessment or rating, nor shall the liability of any person to be assessed or rated questioned in any other manner or by any other authority than in this Act is provided." On the strength of this section, the Municipality of Barisal.

Where there is no liability to pay.

contended that the civil court had no jurisdiction to question the assessment of the municipality, even though the allegation was that the person assessed was not liable to pay, as he did not occupy any holding in the municipality within the meaning of sec. 85 of the Act. Beverley J. overruled the contention on the ground that the word "liability" in sec. 116 had no application to a dispute as to whether a person assessed to a tax did or did not occupy a holding and held that a suit brought to set aside an assessment on the ground that the person assessed did not occupy a holding was not barred by the provisions of sec. 116 (γ).

Since this decision, the section has been amended by leaving out the words, "nor shall the liability of any person to be assessed or rated be questioned"....."or by any other authority." The section as it stands now makes it absolutely clear that the civil court has jurisdiction to entertain suits to set aside a municipal assessment on the ground that the person assessed is not liable to pay and to set aside the assessment, if the ground has been made out.

Thus, in *Tuticorn Municipality v. South Indian Railway* (z), where a tax was levied from

(γ) I. L. R. 21 Cal. 319 at p. 327.

(z) I. L. R. 13 Mad. 78.

a person who was entitled to exemption under the Act, it was held that a suit to set aside the assessment would lie. Similarly in *Corporation of Calcutta v. Standard Marine Insurance Co. (a)*, where the company had been taxed under sec. 87 of the Act, it was held that they were not liable to be taxed as they did not have any place of business within the limits of the Calcutta Municipality but carried on business by their agent at the offices of the latter.

We have said that the civil court will not challenge a municipal assessment, valuation or rating where the dispute is one as regards the amount. But even here the court will entertain a suit if the complaint is that the amount assessed has been worked out on a wrong basis or principle not authorised by the Act. This was laid down by the Calcutta High Court in the case of *Nando Lal Bose v. Corporation of Calcutta (b)*, and followed ever since. There the plaintiff's house was assessed on a wrong basis. Chief Justice Garth held that "the authority of this Court to remove the proceedings of inferior courts in the exercise of their judicial function is unlimited

Where the assessment etc. has been made on a wrong basis.

.....
if the commissioners were exceeding the jurisdiction in making the assessment, it seems clear that we have the power to quash it upon

(a) I. L. R. 22 Cal. 581.

(b) I. L. R. 11 Cal. 275 at p. 278.

certiorari, in spite of sec. 17 in the Calcutta Municipal Corporation Act, 1876."

The two important cases which have settled the law on this point are *Navadwip Chandra Pal v. Purnananda Saha* (c), and *Kameswar Prosad v. Bhabua Municipality* (d). In the former case, the municipality had split up one holding with one assesment into two holdings with two assesments and thus claimed a larger amount than was legally due. It was held that the assesment was *ultra vires* and was not binding. In the latter case of *Kameswar Prasad* the commissioners purporting to act under sec. 85 had assessed a person upon his property and circumstances not only within the limits of the municipality but also outside those limits. The assesment was set aside as *ultra vires* and illegal.

The question as to the jurisdiction of the civil court to challenge municipal assesment was discussed at some length by Mukerji J. in the well-known case of *The Chairman of the Giridih Municipality v. Srish Chandra Majumdar* (e). The learned judge, after having gone through English, American and Indian decisions, summed up his conclusions as follows: "It has been repeatedly ruled that errors in assesment which constitute irregularities merely

(c) 3 C. W. N. 73.

(d) I. L. R. 27 Cal. 849.

(e) I. L. R. 35 Cal. 859; S. C. 12 C. W. N. 709.

and do not go to the ground-work of the tax and render the assessment void, can be corrected only in the manner provided by statute which creates the authority and the remedy so provided must be treated as exclusive. On the other hand where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedy, and all clear violations of law give rise to jurisdictional question. In other words, while mere erroneous exercise of judgment is not reviewable by the civil court, any excess of jurisdiction makes the act liable to challenge."

To make the law on this point still clearer we shall now give a number of cases where the decision of the municipal authority has been held conclusive and not liable to be challenged in a civil court.

We now come to deal with the various statutory powers which have been conferred on municipal bodies for the purpose of enabling them to take measures of improvement, sanitation and conservancy within the areas under their control. Generally speaking these powers are of a discretionary character. The municipality is vested with a discretion as to whether it should exercise any of its powers in a particular case. It may be responsible to the Local Government for its failure to exercise its powers for public benefit. But it is not

Various other statutory powers conferred on municipalities.

responsible to any private person for any such failure, even if the latter has been put to any loss thereby. Thus under the old section 339 of the Bengal Municipal Act, 1884, the district municipality had an absolute discretion in the matter of granting licenses to the owners of markets. The section ran as follows :

“Every license granted under this part shall be liable to the payment of a fee not exceeding twenty rupees, and shall be in force until the end of the year, and the commissioners may grant such license, year by year, on the certificate in writing, under the hand of the chairman, annually renewed, that the land is fit to be used as a market for the sale of provisions as aforesaid.”

The section came up for construction in *Moran v. The Chairman of Motihary Municipality* (f). There the municipality had by refusing sanction put an end to an already existing market to the profit of a market established by itself. Pigott, J., held that “it is within the discretion of the commissioners to grant or refuse a license,” and that the Act afforded no remedy to aggrieved persons. The decision was followed in a similar case which came up before Prinsep and Amir Ali JJ. Both the Judges were of opinion “that is entirely within

(f) I. L. R. 17 Cal. 329.

the discretion of the municipal commissioners to grant or refuse a license and courts have no longer a jurisdiction to control such power, however arbitrarily exercised (*g*)."

Since these decisions, the Amending Act of 1894, sec. 91, has introduced after the words "and the commissioners" in the section 339 as quoted above the following clause for the purpose of safe-guarding the rights of the owners of already existing markets.

"Shall as regards markets lawfully established at the time of the extension of this part to the municipality, and in all other cases."

Under the section as it now stands, the municipal authorities are bound to grant a license to the owner of an already existing market, provided the necessary certificate is forthcoming, but can exercise their discretion as regards other kinds of markets.

Secondly, municipalities enjoy a discretion as to how they should exercise their powers. The legislature has entrusted them with certain duties to be discharged consistently with certain prescribed powers. So long as they keep within their powers, they are the sole judges of how they should perform their duties. The civil court will not take the place of a public body and

(*g*) *R. v. Mukunda Chandra Chatterji*, I. L. R. 20 Cal. 654.

dictate to it how it should discharge its obligations to the public. As we have already seen, all questions of relative necessity, advantage or facility are questions of municipal detail and the civil court will not seek to regulate them by challenging the decisions and acts of municipal bodies. Provided the municipality, act *bonâ fide* and reasonably, the courts will not interfere. This principle has been established by a series of decisions, English and Indian.

Thus in *Duke of Bedford v. Dawson* (*h*), Jessel M. R. while construing the expression "for the purpose" observed as follows: "This means that when the words 'for the purpose' are used, that does not imply what the plaintiff or some one else think the purpose, or what the court may think is the purpose, but it means what the public body entrusted with the power by the legislature may in their honest and reasonable exercise of judgment think necessary for the purpose. They are to be the judges, subject to this, that if they are manifestly abusing their powers, and purporting to use the law for a purpose for which manifestly it is not intended, the court will say it is not a fair and honest judgment and will not allow it."

Similarly, in a somewhat recent case (*i*) which we have already cited, the House of

(*h*) L. R. 20 Exch. 383.

(*i*) *Mayor etc. of Westminster v. L. & N. W. Ry. Co.*,
L. R. (1905) A. C. 426.

Lords laid down the principle that if municipalities use their statutory powers *bonâ fide* and reasonably their action as to the *mode* of acting cannot be challenged. In that case, Lord Lindley, J., observed as follows: "Matters of detail, of taste, and of expense in executing works authorised by statute are left to the constructing authority; and their decision on such matters is not open to review in an action for an injunction unless the court is of opinion that the statutory authority is a mere cloak to screen an unauthorised work."

In this country there have been a large number of cases where the exercise of the powers of municipal bodies has been challenged by private persons but upheld by the court on the basis of the principles enunciated above.

Section 175 of the Bengal Municipal Act, 1884, authorises the commissioners to require owners or occupiers of any land to do anything to it or to execute any work in respect of it, provided the cost does not exceed the sum of Rs. 300. If the work is not done within the time specified in the requisition, the commissioners, under section 180 of the Act, may enter upon the land and "perform all necessary acts for the execution of the work or doing of the thing required." It was held in *Re Joges Chandra Dutt (j)* that under the section

(j) 16 W. R., p. 285.

the municipality has a discretion both as to the objects upon which they should proceed and as to the manner in which they should do so.

Similarly in *F. W. Duke v. Rameswar Malia (k)*, where the defendants contended that the municipality had no power to order the opening of a bustee-road on the ground that such an opening was not necessary, the court held that it had no jurisdiction to try the question whether the municipality, when it was acting within the limits of its statutory power, was right in its judgment whether a certain road should be opened.

We shall notice one more case, viz., *Patel Panachand Girdhar v. Ahmedabad Municipality (l)*, which was decided by the Bombay High Court. There the question raised was whether the removal of a particular building was required for the purposes of public convenience. The court held that "the legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience,

(k) I. L. R. 26 Cal. 811.

(l) I. L. R. 22 Bom. 230 at p. 233.

See also *Nagar Valab Narsi v. Municipality of Dhan dhuka*, I. L. R. 12 Bom. 490.

Ahmedabad Municipality v. Manilal Udenath, I. L. R. 19 Bom. 212.

Municipal Commissioners for the City of Madras v. Parthasaradi, I. L. R. 11 Mad. 341.

and its discretion is not subject to control by the courts."

Thirdly and lastly, it is an established principle of law that municipal corporations will be allowed in the exercise of their powers, a much greater freedom than will be accorded to ordinary commercial corporations under similar circumstances. This was clearly enunciated in the well known case of *Galloway v. Mayor, etc., of London* (*m*), and has been followed ever since in England and in this country. Following this case the Bombay High Court laid down the principle in *Ollivant v. Rahimtula Nur Mahomed* (*n*) that "where an Act gives power to a municipality or corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised for private gain or other advantage." In that case, the eaves of two of the plaintiffs' buildings projected two feet over the street and descended to about two feet and nine feet respectively above the level of the roadway. The municipality ordered the plaintiff to remove the eaves as constituting an obstruction within the meaning of section 195 of Act III of 1872 and Act IV of 1878. It was

(*m*) L. R. 1 Eng. and Ir. App. 34.

(*n*) I. L. R. 12 Bom. 474.

See also *Quinton v. Corporation of Bristol*, L. R. 17 Eq. 524. Brice or Ultra Vires, p. 16.

See also *Bagshaw v. Buxton Local Board of Health*, L. R. 1 Ch. D. 220 at pp. 223, 224.

held that for the eaves to constitute an obstruction within the meaning of the section, it is not necessary that there should be a real practical inconvenience to the public traffic in the street. Traffic along the street means traffic along the whole of the street, and the eaves were considered to constitute an obstruction to traffic in the part of the street over which they projected.

Here the municipality had the power to order the removal of obstructions to traffic in the street. The court decided that that power could be exercised, when there was some obstruction, even though the obstruction did not cause real practical inconvenience to the public traffic in the street.

Not only would the powers of municipal bodies be construed more liberally by the court than those of private corporations, but the proceedings of the former will be criticised less rigourously than those of the latter. Thus in the case of *Lord H. Ulick Browne v. Womesh Chandra Roy* (o), where the municipal authorities, acting under Sec. 73 of the Bengal Municipal Act 1864 (p), had entered upon the defendant's land and cleared away the jungle growing on it, it was held that they were entitled to do so on the report of their medical officers and that

(o) (1867) 7 W. R. 213.

(p) This corresponds to sec. 180 of the Bengal Municipal Act of 1884.

they were not bound like a judicial officer to summon each individual and to sit and hear evidence on both sides in the presence of the parties concerned and further that they were not bound to inspect each particular spot of land personally and individually and to ascertain by evidence whether the jungle growing there was injurious to the health of the neighbourhood or not.

We shall now consider powers of a *quasi-* Bye-laws.
legislative character which have been conferred on municipalities. They relate to the making of rules and bye-laws. A municipal body as also other corporate bodies have, in common law, the power of making bye-laws. But there is this important difference between the bye-laws of municipal corporations and those of non-municipal corporations, *viz.*, the bye-laws of the latter are obligatory on its members only, but those of the former are obligatory upon all the inhabitants of a district over which they have jurisdiction (*q*). In this country, the power of making bye-laws has been specially conferred by legislation. Sections 350 and 351 of the Bengal Municipal Act, 1884, enact as follows :—

“ The Commissioners of any municipality may, from time to time, at a meeting which shall have been convened expressly for the purpose,

(*q*) See Grant on Corporations, p. 77.

and of which due notice shall have been given, frame such bye-laws as they deem fit, not being inconsistent with this Act or with any other general or special law for—

- (a) regulating traffic, and for prevention of obstructions and encroachments, and of nuisance on or near the roads;
- (aa) prohibiting the letting-off of fire-arms, fire-works, fire-balloons or bombs, except (i) with the permission of the commissioners or a member of the Ward Committee or a municipal officer empowered by the commissioners in this behalf, and (ii) on payment of fees at such rates as may be sanctioned by the commissioners at a meeting;
- (b) regulating the use of, and the prevention of nuisances in regard to public water-supply, bathing and washing-places, streams, channels, tanks and wells;
- (c) regulating the disposal of sewage, offensive matter, carcasses of animals, and rubbish, and the management of privies, drains, cess-pools and sewers;
- (d) regulating cremations and burials and the disposal of corpses;

- (e) preventing nuisances affecting the public health, safety or convenience ; and

- (f) giving effect to the objects of this Act ;

and may, by such bye-laws impose on offenders against the same such reasonable penalties as they think fit, not exceeding the sum of fifty rupees for each offence

and, in case of a continuing offence a further penalty not exceeding twenty rupees for each day after written notice of the offence from the commissioners.

Bye-laws made under this Act shall not take effect unless and until they have been submitted to, and confirmed by the Local Government, nor shall such bye-laws be confirmed—

unless one month at least before the making of the application, notice of the intention to apply for confirmation has been given in one or more of the local newspapers circulated within the municipality to which such bye-laws relate, or if there be no such newspapers, then in such manner as the commissioners may direct ; and unless, for one month at least before any such application, a copy of the proposed bye-laws has been kept at the office of the commissioners, and has been kept open during the office hours thereat to the inspection of the inhabitants of

the municipality to which such bye-laws relate, without fee or reward."

* * * *

The Local Government may cancel its confirmation of any such bye-law, and thereupon the bye-law shall cease to have effect.

It follows from the general principles of the doctrine of *ultra vires* that municipalities in this country can make bye-laws only in regard to matters specified above, as also in the manner prescribed. The bye-laws to be valid must keep within the limits imposed by the legislature. No doubt, the courts as a rule deal with them more generously than with private corporations. But this will not protect them from the interference of the courts of law if their bye-laws manifestly go beyond the prescribed limits (r).

Sec. 350 enacts that "the commissioners . . may . . frame such bye-laws . . not being inconsistent with this Act or with any other general or special law." Bye-laws are inconsistent only if they alter and thereby contradict the Act, and in determining this, the object and policy of the whole Act must be considered (s). Further, bye-laws must not be

(r) *Chairman of Howrah Municipality v. Montanee Bewah*, 24 W. R. Cr. 70. *Corporation of Calcutta v. Jadav Dooly*, I. L. R. 20 Cal. 605. *Municipality of Bombay v. Sunderjee*, I. L. R. 22 Bom. 980. *Tribhovan v. Ahmedabad Municipality*, I. L. R. 27 Bom. 221.

(s) *Tribhovan v. Ahmadabad Municipality*, I. L. R. 27 Bom. p. 221.

inconsistent with any other general or special law in force in this country. This prevents municipalities from making bye-laws, the effect of which would be to make that lawful which is by general or some special law unlawful or that unlawful which the general law or some special law declares to be lawful (t). But this does not prevent them from creating new offences (u).

Beside laying down certain limitations the legislature has prescribed a certain procedure to be followed by municipalities in making bye-laws. The courts require strict adherence with the procedure, any substantial deviation from it being considered fatal to the validity of the bye-law in question (v). There is one important point in connection with the procedure which is worth our consideration at this stage viz., necessity of confirmation of bye-laws passed by municipalities by the Local Government before they become operative. It should be borne in mind that the confirmation by the Local Government of a bye-law which is *ultra vires* or illegal does not make it *intra vires* or legal or operative. This has been

(t) *London's (Chamberlain) Case*, 5 Co. Rep. 62b.; *Calder & Hebble Navigation Co. v. Pilling*, 14 M. & W. 76; *Toronto (City) Municipal Corn. v. Virgo*, (1896) A. C. 88 (P. C.)

(u) *Gentel v. Rapps*, (1902) 1 K. B. 160.

(v) *Q. E. v. Yusuf Khan*, I. L. R. 8 All. 677.

the decision of English as also of Indian courts (w).

Beside fulfilling the statutory requirements laid down by the legislature, the bye-laws of municipalities must fulfil the requirements which are insisted on by common law. The bye-laws of municipal corporations as also of other corporations must be just and reasonable (x). A bye-law which is manifestly partial, and unequal in its operation between different classes or unjust or made in bad faith or clearly involving unreasonable interference with the liberty of those subject to it will not be supported by courts of law (y).

There is a class of bye-laws which are rather closely scrutinised by the courts of law, viz., those that seek to interfere with the rights and liberties of those who are subject to them (z). A very strong and decided opinion was expressed on this point in an Allahabad case (a) the main facts of which are as follows :

(w) *Foster v. Dodd*, L. R. 1 Q. B., 475. *Kruse v. Johnson*, (1898) 2 Q. B. 91; *Ellwood v. Bullock*, 6 Q. B., 383. *Brindaban v. Chairman, Sirampore Municipality*, 19 W. R. 309. *R. v. Yenku Bapuji and others*, 3 Bom. H. C. Reports (Cr. cases) 39 at 48, per Westropp, C. J.

(x) *Slattery v. Naylor*, 13 Ap. Cas. 446; *Kruse v. Johnson*, (1898) 2 Q. B., 91; *White v. Morley*, (1899) 2 Q. B. 34; *Clayton v. Pierce*, (1904) 1 K. B. 424; *Scott v. Pilliner*, (1904) 2 K. B. 855.

(y) *Emperor v. Balkishan*, I. L. R. 24 All. 439.

(z) *Corporation of Calcutta v. Judub*, I. L. R. 20 Cal. 605.

(a) *Ganga Narayan v. Municipal Board of Cawnpore*, I. L. R. 19 All., 313.

The plaintiff was the owner of a long established market. The municipality of Cawnpore established a market of their own and wanted to close the plaintiff's market. Section 55 of Oudh and N. W. P. Municipality Act authorised municipalities to make rules prohibiting or controlling the establishment or maintenance of markets and controlling their management. The old rule which the Cawnpore municipality had framed under this section did not permit them lawfully to close the plaintiff's market ; so they got a new rule passed, with the sanction of the Local Government, to the following effect : " No person shall establish or maintain a public market, etc., . . . in any place without the sanction of the Board or except under such conditions as the Board may from time to time prescribe." Armed with this rule the municipality proceeded to close the plaintiff's market. The latter brought a suit for injunction. Edge, C. J., and Blair, J., who heard the appeal, after characterising the conduct of the municipality as not altogether free from considerations of a *malafide* character, observed as follows : " In our opinion, . . . it never could have been the intention of the legislature to give power to a Municipal Board to make a rule which would enable them to confiscate private rights in markets, where the holding of the market and the maintenance of the market could not be objected

to on public grounds without making any compensation to the persons whose rights are affected . . But until the legislature tell us that it was the intention to confer upon Municipal Boards the power to confiscate private rights . . and to do so without paying any compensation, we must construe clause (e) in such a manner as not to cast slur upon the legislature of having worked a gross injustice, and we do so construe."

Before we close this part of the subject, we shall notice another case decided by the Bombay High Court (b). There the municipal commissioners acting under sections 6 and 7 of Bombay Act XXVI of 1850 had conferred on their managing committee the power to try persons charged with having broken their rules or bye-laws and to levy fines upon them. It was held that municipal commissioners appointed under Bombay Act XXVI of 1850 had not by that Act conferred upon them, nor were they entitled to assume, judicial powers with reference to breaches of rules or bye-laws made by them under the Act and that accordingly rules made under the above Act which purported to give the managing committee the power to try offenders against such rules and to levy fines upon them were *ultra vires* and illegal.

(b) *R. v. Yenku Bapuji and others*, 8 Bom. H. C. Reports (Cr. cases) 39. See also *R. v. Kalidas Keval*, 5 Bom. H. C. Reports (Cr. cases) 10.

LECTURE VIII.

Local Boards.

The growth of local institutions outside the cities was of slower growth. In Madras and Bombay there were semi-voluntary funds for local improvements which formed the foundation for local self-government. In Bengal and the United Provinces consultative committees assisted the district officers in the management of funds devoted to local schools, roads and dispensaries. The system of raising local cesses current under the Native Governments was first sought to be replaced in Sindh by Bombay Act VIII of 1865. That Act gave power to levy cess on land, or shop or office in the same way as land-revenue. It presupposed the existence of local executive committees, but made no provision for their constitution. In 1866 an Act was passed for the levy of a local rate in the Madras Presidency, but the rate-payers took no part in the administration of the funds. In 1869 an Act was passed for the levy of cess on land, fixing the maximum, and for the recovery of the cess by landholders from their tenants. The proceeds of the cess were to be administered by committees nominated by the Government and under the supervision of the Collector.

Early
history.

Policy of
Lord Mayo.

In 1870 Lord Mayo adopted the policy of financial decentralisation and the resolution of the Government was in these terms: "Local interest, supervision and care are necessary to the success in the management of funds devoted to education, sanitation, medical charity and local public works. The operation of this resolution in its full meaning will afford opportunities for the development of self-government, for strengthening municipal institutions, and for the association of Natives and Europeans to a greater extent than hereto in the administration of affairs." As a consequence of this policy, there was a wide development of legislation for local purposes and in 1871, new Acts were passed in Madras, Bengal, the United Provinces and the Punjab. These Acts provided for the levy and collection of rates, divided the country into local fund circles, and constituted consultative boards, nominated or elected, mostly under the presidency of the Collector. For the following ten years, this system of management by the boards was nominally working, though in reality, the members of the boards took little interest and left the management of the funds entirely in the hands of the officers of the district.

Extension
of the
principle
by Lord
Ripon.

In 1881-82, the Government of Lord Ripon issued orders for the reorganisation of local institutions and for the extension of the principle of local self-government. Under these

orders the existing local committees were to be replaced by a net work of boards all over the country and the lowest administrative unit was to be small enough to secure real interest on the part of the members and the various minor boards were to be subordinate to a district board, on which the minor boards were represented. The Government also transferred to these boards certain items of provincial revenue, and assigned to them a proportionate share of the provincial expenditure. Acts were accordingly passed in the several provinces, with variations suitable to the conditions of the locality (a).

Under these Acts each province devised a system of boards of different gradations. In Bengal, a district board was constituted for each district and the establishment of subordinate local boards was left to the discretion of the Local Government. In Bombay and the United Provinces, two grades of local boards were created, the district board, and the taluk board and in Madras there was a third grade, namely, unions of villages. We shall now proceed to examine the constitution, functions and powers of the local boards, with special reference to the Bengal Local Self-Government Act of 1885.

Local boards are mostly under the control of the Local Governments. They are created

Local Self-Government Act

Control of Local Government

(a) Bengal Act III of 1885; Madras Act V of 1884; Bombay Act I of 1884; Act I of 1883 (Central Provinces); Act XX of 1883 (Punjab); Act III of 1906 (United Provinces).

by and their jurisdiction is limited by the notifications of the Local Governments. The members are partly elected and partly or wholly appointed by the Local Government (b). The Lieutenant-Governor may make rules for the qualification of persons entitled to vote for election of members of local boards as well as of persons entitled to be members of local boards (c), may remove any member under specified circumstances (d), can see that the proceedings of the local authorities are in conformity with the law and can annul any proceedings not so in conformity (e), can inspect all books, proceedings and records (f), can appoint an officer to be inspector of local works (g), can make rules for certain purposes (h) and can on persistent default in the performance of duties imposed on it by law supersede a local board for a period to be specified in a notification (i). Lastly, several acts and transactions of the local boards require the sanction and confirmation of the Local Government for their validity (j).

(b) Sec. 7 of Act III of 1885 (B. C.)

(c) Sec. 9, 13 *ibid.*

(d) Sec. 18 *ibid.*

(e) Sec. 12 *ibid.*

(f) Sec. 121 *ibid.*

(g) Sec. 13 *ibid.*

(h) Sec. 138 *ibid.*

(i) Sec. 131 *ibid.*

(j) Sec. 32 129 *ibid.*

In Bengal, district boards are to be established in each district, but the Lieutenant-Governor may by notification establish a local board in any sub-division or in any two or more sub-divisions combined (*k*). A district board shall consist of such number of members, not being less than nine, as fixed by the Lieutenant-Governor and may include elected and appointed members, provided that if there be no local board within a district, the whole of the district board shall consist of appointed members (*l*). A local board shall consist of such numbers of members, not being less than six, at the discretion of the Lieutenant-Governor (*m*). The term of office of members, other than those appointed by official designation, shall be fixed by rules made by the Lieutenant-Governor (*n*). Every district board shall be presided over by a chairman who shall be appointed by the Lieutenant-Governor or should the Lieutenant-Governor in any case so direct, be elected by the members of such board from among their numbers, subject to his approval (*o*), and every district board shall from time to time elect one of its members to be vice-chairman (*p*). Every local board shall elect

(*k*) Sec. 6 *ibid*.

(*l*) Sec. 7 *ibid*

(*m*) Sec. 8 *ibid*.

(*n*) Sec. 16 *ibid*.

(*o*) Sec. 22 *ibid* }

(*p*) Sec. 23 *ibid* }

- (b) all powers and duties of the district board or local board may, until such district board or local board is reconstituted, be exercised and performed by such person or persons as the Lieutenant-Governor may from time to time appoint in that behalf ;
- (c) when a district board is superseded, all property vested in it shall, pending the reconstitution of the board, be vested in the Lieutenant-Governor (u).

Re-establishment of boards.

On the expiration of the period of supersession specified in the notification, the board shall be re-established, and the persons who vacated their offices under clause (a) shall be eligible for appointment or election. Nevertheless it shall be lawful for the Lieutenant-Governor to direct that a local board thus re-established shall consist entirely of appointed members, although such local board may have been established in a district mentioned in the third schedule of the Act (v).

District board a body corporate.

Every district board shall be a body corporate by the name of "the district board of (name of district)" and shall have perpetual succession and a common seal, with power to acquire and hold property, both moveable and

(u) Sec. 132 *ibid.*

(v) Sec. 132 *ibid.*

immoveable, and, subject to any rules made by the Lieutenant-Governor under the Act, to transfer any such property held by it, and to contract and do all other things necessary for the purposes of the Act, and may sue and be sued in its corporate name (*w*).

From and after the establishment of a district board in any district all roads, bridges, channels, buildings and other property, moveable or immoveable, held by, or under the control and administration of, the district road committee or any branch committee in such district for the purposes of the Cess Act, 1880, shall for the purposes of this Act, be under the control and administration of such district board;

Vesting of
property.

Provided that all village-roads within the limits of any union established in the said district shall be under the control and administration of the union committee (*x*).

Every road, building or other work constructed by a district board from the district fund shall be vested in the district board by which it has been constructed (*y*).

There shall be formed for each district a fund to be called the "district fund," and there shall be placed to the credit thereof—

Funds

- (1) the balance of the district road fund of the district, after payment of the

(*w*) Sec. 20 *ibid.*

(*v*) Sec. 73 *ibid.*

(*y*) Sec. 75 *ibid.*

expenses mentioned in section 109 of the Cess Act, 1880, as amended by this Act ;

- (2) all sums levied within the district as fines, penalties or otherwise under this Act ;
- (3) all sums accruing within the district under the provisions of the Cattle-trespass Act, 1871, from pounds which have not been transferred to any union committee under section 111 of this Act ;
- (4) all receipts in respect of public ferries within or on the boundary of the district which have been placed under the management of the district board under the provisions of the Bengal Ferries Act, 1885.
- (5) all receipts in respect of any schools, hospitals, dispensaries, railways, tramways or other buildings, institutions or works, which may have been constructed by, vested in or placed under the control and administration of a district board under Part III of this Act ;
- (6) all sums which may be allotted to the district board from the provincial revenues by the Lieutenant-Governor for any of the purposes mentioned in

Part III of this Act, or for any other purpose ;

- (7) all sums contributed to the district board by local bodies or private persons.

The district fund shall be vested in the district board, and the balance standing to the credit of the fund shall be kept in such custody as the Lieutenant-Governor from time to time directs (z).

The district fund shall be applicable to the following objects, and in the following order :—

Application
of funds.

Firstly :—To the payment of any sums which the district board may be liable to pay as interest upon loans raised by it under section 50 for the purposes of this Act, and to the formation of a sinking fund, when required.

Secondly :—To the payment of any sums which the district board may under this Act, from time to time, have undertaken to pay as interest on capital expended on any works which may directly improve the means of communication within the district, or between such district and other districts.

Thirdly :—To the payment of such percentage as the Lieutenant-Governor may, from time to time, direct, towards the cost of audit,

(v) Sec. 52 *ibid.*

and towards the cost of establishments in any office of account, or in any treasury.

Provided that the total amount, which any district board may be required to pay on this account, shall not in any year exceed two per centum on the whole amount of the district fund for such year.

Fourthly :—To the payment of the salaries of the establishments employed by the district board for the purposes of this Act, and of any pensions and gratuities granted under section 3 and section 35, and to the payment to the Government of such percentage as the Lieutenant-Governor may, from time to time, direct on the salaries of such establishments in consideration of the Government undertaking to pay the leave and pension allowances of such establishments.

Fifthly :—To the payment of expenses incurred by the district board in the performance of the duties imposed by this Act, and in the construction, repair and maintenance of any works which may become vested in, or be placed under the control and administration of, such Board under Part III of this Act.

Sixthly :—To the payment, at such rates as the Lieutenant-Governor may direct, of the travelling expenses incurred by members of the district board in attending meetings of the board or meetings of a joint-committee.

Seventhly :—To the payment of expenses incurred by the district board under section 80 of this Act.

Eighthly :—To investment in any local debenture loans issued by the Government of India, or by any municipal authority or local authority, for the construction of public works which may directly improve the means of communication within the district or between such district and other districts ;

Provided—

- (1) that no sum shall be expended from the district fund in the construction of any channel for the purposes of irrigation ;
or for the purposes of drainage connected with any irrigation-works in charge of public officers ;
or for the improvement or maintenance of any water channel on which tolls are levied, when no portion of the proceeds of such tolls is paid into the district fund ;
- (2) that no part of the district fund shall be applied to the construction, repair or maintenance of any road within any municipality which has been, or may hereafter be, constituted under the Bengal Municipal Act, 1884, unless such road shall have been expressly excluded from the operation

of the said Act under section 30 thereof (a).

Power to
make rules.

Every district board, and every local board with the sanction of the district board, may from time to time make rules as to—

- (a) the time and place of its meetings, the business to be transacted at meetings, and the manner in which notice of meetings shall be given ;
- (b) the conduct of proceedings at meetings, the due record of all dissents and discussions, and the adjournment of meetings ;
- (c) the custody of the common seal and the purposes for which it shall be used ;
- (d) the division of duties amongst its members ;
- (e) the powers to be exercised by the chairman or vice-chairman, or by sub-committees or members to whom particular duties are assigned ;
- (f) the persons by whom receipts shall be granted for money received under this Act ;
- (g) the duties, appointment, leave, suspension and removal of the officers and servants of the board ; and

- (h) other similar matters ;
and may from time to time repeal or alter such rules.

Rules made under this section, consistent with this Act, shall be subject to the sanction of the Lieutenant-Governor, and shall, if sanctioned by him, be published in such manner as he may direct ; and shall have the force of law so long as they are consistent with the rules made by him under this Act (b).

Every district board or local board empowered in this behalf by the Lieutenant-Governor may make bye-laws for carrying out all or any of the purposes of this Act. Such bye-laws shall have the force of law when confirmed by the Lieutenant-Governor and published in such manner and for such time as the Lieutenant-Governor may direct (c).

Power to make bye-laws.

Among the important functions of district boards are the establishment, maintenance and management of pounds, primary and middle schools and, if authorised, of High English Schools, and of dispensaries and hospitals, the construction and maintenance of railways, tramways or other means of communication or of any means and appliances for improving the supply of drinking water. It is the duty of the district board to provide for sanitation, and to appoint, pay and manage the work of all

Other important functions of district boards.

(b) Sec. 32 *ibid.*

(c) Sec. 139 *ibid.*

public vaccinators. It shall be lawful for a district board to provide measures for the relief of famine, establish and maintain staging bungalows and *sarais*, offer rewards for the destruction of noxious animals, hold fairs and exhibitions and generally to carry out any other local work likely to promote the health, comfort or convenience of the public.

Of local
boards.

A local board may make due provision for matters transferred to its control and administration by the direction of the district board, but shall not incur expenses or undertake liability to any amount exceeding the limit conferred by the district board

The local board may, with the consent of a union committee, delegate to such committee the management of so much of any road under the management of the local board as may be situated within such union and such union committee shall thereupon do all things necessary for the maintenance and repair of the portion of road so assigned to it, and shall be responsible to the local board in that behalf (d).

The local board may, with the consent of a union committee, delegate to such committee the execution of any work of sanitation, drainage or water-supply affecting the union(e).

(d) Sec. 110 *ibid.* This section has been amended by Sec. 49 Bengal Act V of 1908.

(e) Sec. 115 *ibid.*, but see Sec. 55 of Bengal Act V of 1908.

The Lieutenant-Governor may, by order in writing, constitute any village or group of villages into a union; and may prescribe for such union the number of members of which the union committee shall consist. Such number shall not be less than five or more than nine. It shall be lawful for the Lieutenant-Governor from time to time to vary or annul such order (*f*).

Constitution of unions.

Such members shall be elected from among the residents of the union, in accordance with rules made by the Lieutenant-Governor under this Act, and shall constitute the union committee of such union (*g*).

A union committee as the agent of, and subject to the control of, the local board shall, within the union, have the control and administration of, and be responsible for, all matters except such of those matters as the local board may think fit to take under its direct control and administration (*h*).

Powers of unions.

A union committee shall not incur expenses, or undertake liabilities to any amount exceeding the limit imposed by the local board (*i*).

(*f*) Sec. 38 *ibid*.

(*g*) Sec. 39 *ibid*.

(*h*) Sec. 104 *ibid*.

(*i*) Sec. 106 *ibid*.

A union committee shall, so far as the union fund permits, from time to time, cause the village roads to be maintained and repaired and may do all things necessary for such purpose, and may—

- (a) lay out and make new village-roads ;
- (b) build and construct new bridges ;
- (c) turn, divert, discontinue or stop up any village-road or bridges thereon ;
and
- (d) widen, open, enlarge, or otherwise improve any such road or bridges thereon (j).

A union committee may cleanse or repair any public tank, stream, well or drain within the union, and charge the cost of such cleansing or repairing, which shall in no case exceed a sum of one hundred rupees, to the union fund, or, if such fund be not sufficient, may levy such cost from persons resident within the union in the manner provided for the levying of the chaukidari-tax under the Bēngal Village Chaukidari Act of 1870 or any other Act for the time being in force (k).

(j) Sec. 109 *ibid.*

(k) Sec. 117 *ibid.*

LECTURE IX.

Board of Revenue.

THE grant of the Dewanny by King Shah Alum to the East Indian Company on the 12th of August 1765 is generally regarded as the acquisition of sovereignty by the English in India. But the meaning of the grant, in theory, was thus expressed by the Court of Directors, "we conceive the office of Dewan should be exercised only in superintending the collection and disposal of the revenues. This we conceive to be the whole office of the Dewan." Under that grant the East Indian Company engaged "to be security for the sum of 26 lakhs of rupees a year for our royal revenue and regularly remit the same to the royal circar; and in this case, as the said Company are obliged to keep a large army for the protection of the Provinces of Bengal, etc., we have granted to them whatsoever may remain out of the revenues of the said provinces, after remitting the sum of 26 lakhs of rupees to the royal circar and providing for the expenses of Nizamut" (a).

Grant of the
Dewanny.

The East India Company thus became responsible for the collection of the revenue in the provinces of Bengal, Behar, Orissa. In the

Early administration.

(a) See Aitchison's Treaties (India), p. 60.

beginning a resident at the Nawab's court inspected the management of the Naib Dewan, and the Chief of Patna superintended the collections of the province of Behar. The Zamindary lands of Calcutta and 24-Pergunnas and the ceded districts of Burdwan, Midnapur and Chittagong, which had been granted earlier by the Nawab of Bengal, were superintended by the covenanted servants of the Company. In 1769, European local supervisors were appointed with power of superintending the native officers collecting the revenue or administering justice and in the next year two revenue councils of control, with superior authority, were established at Moorshedabad and at Patna (b).

Origin of
Board of
Revenue.

In 1771, the Court of Directors declared their resolution "to stand forth as Dewan and by the agency of the Company's servants to take upon themselves the entire care and management of the revenues." In consequence of this resolution, the duties of administration were transferred to the servants of the Company and the system of government through the Nawab's officials, subject to English supervision, was abandoned. The Company appointed Collectors of the Revenue in each district with additional powers of supervision of the Mofussil Dewani Adawlat

or Provincial Courts of Civil Justice. A Committee of Revenue, which soon afterwards assumed the name of a Board of Revenue, was created, consisting of the Governor and four members of the council and the treasury was removed from Moorshedabad to Calcutta (c). This was the scheme which was introduced by Warren Hastings, Governor of Bengal, in 1772.

In 1773, an Act of Parliament was passed "for establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe," commonly called the Regulating Act. In consequence of this Act, numerous alterations were made in the scheme of Warren Hastings. In 1775, the superintendence of the collection of revenue was vested in six provincial councils appointed for the respective divisions, Calcutta, Burdwan, Dacca, Moorshedabad, Dinajepore and Patna. In pursuance of the legislative authority conferred by the Regulating Act, regulations were passed in 1780, by the first of which (d), the jurisdiction of these six provincial councils was confined exclusively to revenue matters; that is, all cases regarding revenue or rent were reserved for the exclusive cognisance of these councils or of the Collectors who superseded them (e).

The Regulating Act.

(c) Fifth Report, I. 5, 21.

(d) Reg. I of 1780, section 3.

(e) Harrington's Analysis, I. 31; Fifth Report, I. 10.

Scheme of
Lord Corn-
wallis.

In 1786 Lord Cornwallis became Governor-General of India. To carry out the object of Parliament as expressed by an Act of 1784 (*f*), the Court of Directors instructed the new Governor-General "to establish permanent rules for the settlement and collection of the revenue and for the administration of justice founded on the ancient laws and local usages of the country." In pursuance of these instructions, a union of civil and revenue jurisdictions was effected. A revised Code of Judicial Regulations was issued under which all revenue cases were assigned to the Collector, from whom an appeal lay to the Board of Revenue, and ultimately to the Governor in Council (*g*). But in consequence of a change of policy in 1793 (*h*), Lord Cornwallis returned to the system of separation of fiscal and judicial systems, and by Regulation II of 1793 the Collectors were entrusted with the collection of revenue as executive officers subordinate to the Board of Revenue.

Later his-
tory of the
Board of
Revenue in
Bengal.

By Regulation III of 1822 three Boards of Revenue were separately constituted for the Lower, Central and Western Provinces respectively (*i*). By Regulation I of 1829

(*f*) 24 Geo. III. c. 25.

(*g*) Harinton's Analysis, I. 32.

(*h*) Harington's Analysis, I. 42.

(*i*) This provision was formally repealed by Act XVI of 1874.

Commissioners of Revenue and Circuit were appointed over districts grouped into twenty divisions and in them were vested the powers formerly exercised by the Board of Revenue and a Sadr or Head Board of Revenue was constituted at the Presidency with power of control and direction over the Commissioners. By Act XLIV of 1850, this Sadr Board of Revenue came to be styled as the Board of Revenue for the Lower Provinces of the Presidency of Fort William in Bengal. After the partition of Bengal and the constitution of the province of Eastern Bengal and Assam a Board of Revenue was likewise formed for that province with powers similar to those exercised by the Board of Revenue of the Lower Provinces of Bengal (*j*).

In the United Provinces of Agra and Oudh (*k*) the Board of Revenue is the Chief Controlling Authority and its general powers are mentioned in U. P. Act III of 1901 and these are almost similar to those exercised by the Board of Revenue in Bengal.

Board of
Revenue in
the United
Provinces.

In the territories subject to the Government of Fort St. George, the superintending management of the affairs of revenue appears to have been conducted by the President and Council without the aid of a subordinate

Board of
Revenue in
Madras.

(*j*) See Act VII of 1905, Section 4.

(*k*) For the recognition of this designation, see Act VII of 1902.

establishment until the year 1780, when a Board of Revenue was constituted at Fort St. George on the plan of the Committee of Revenue then existing at Calcutta. This was done in pursuance of the prescriptions of the Act of 1784 and of the instructions issued to the Government of Fort St. George in conformity thereto. By Regulation I of 1803, the Judicial authority of the Board of Revenue was formally abrogated and its duties and powers in the matter of revenue were defined. These powers were to some extent supplemented by Madras Act I of 1894.

Powers of
Board of
Revenue.

The powers and functions of the Board of Revenue in Bengal are scattered over a number of old Regulations. Except to the extent to which those Regulations have been repealed, they are still on the statute-book. Under Regulation II of 1793 "the Board of Revenue is held at the seat of Government, it has a secretary, with assistant translators and other officers, European and Native. In this Board is vested the general control over the Collectors of land revenue, with authority to superintend their proceedings and to suspend them from their offices if negligent in the performance of their duty. Their own proceedings are in like manner subject to the superintendence of the Government, and the orders of Government in this department are circulated through the Board of Revenue to the Collectors. The

Board of Revenue is constituted a 'Court of Wards,' with power to control the conduct and inspect the accounts of those who manage the estates of persons disqualified by minority, sex or natural infirmity for the administration of their own affairs. The Board may make periodical reports to Government on the state of revenues and their proceedings were transmitted through the Government to the Court of Directors (1). By Regulation IV of 1821 the Board of Revenue was empowered to depute any of the officers subordinate to its authority to exercise and perform all or any of the powers and duties ordinarily vested in Collectors. Under Regulation III of 1822 any single member may separately, if so authorised, exercise part of the duties; the decision of any question shall be determined according to the majority of the voices; in the case of officers immediately subordinate to the Board no final orders regarding appointment, removal or punishment can be passed without the concurrent judgment of two or more members; and the Board may review, rescind, alter or confirm any order or decision passed by them in cases meriting further investigation.

Besides the powers specifically mentioned in these Regulations, Boards of Revenue have

Powers
under
special Acts.

(1) Fifth Report, I. 43-44.

various other powers (*m*) over charities (*n*) and over estates of wards (*o*) and as a tribunal of appeal and revision (*p*). They can make rules (*q*) under various Acts consistent with the provisions thereof. So long as the rules framed and the powers exercised are within the limits and in the manner provided by the legislature, they will be valid, but if otherwise, will be *ultra vires*.

(*m*) See Ben. Act VII of 1864; Reg. II of 1819. And Mad. Acts II of 1864; VI of 1867; II of 1904.

(*n*) Ben. Reg. XIX of 1810; Mad. Reg. VII of 1817. In respect of endowments for the support of mosques, Hindu temples, or other religious purposes, the Religious Endowments Act (XX of 1863) has repealed these regulations.

(*o*) Ben. Act IX of 1879; Mad. Act I of 1902; U. P. Act III of 1899.

(*p*) Ben. Acts VIII of 1865; V of 1875; III of 1876, VIII of 1876; I of 1879; VII of 1880; IX of 1880; XI of 1859; Regs. V of 1812; VII of 1822; XII of 1817; and Mad. Acts. XII of 1857; VII of 1865; II of 1894; III of 1895; III of 1905.

(*q*) Ben. Acts V of 1875; VII of 1876; VIII of 1876; VII of 1878; IX of 1879; IX of 1880; and Mad. Acts II of 1894; III of 1896; I of 1902.

LECTURE X.

Companies.

IN the year 1882, it was thought expedient to amend the law relating to the incorporation, regulation and winding up of trading companies and other associations and for that purpose the Indian Companies' Act (VI of 1882) was passed. It laid down the constitution and incorporation of companies and associations, prescribed rules for the distribution of the capital and liability of members, provided for the management and administration and contained the procedure for winding them up voluntarily or through the assistance of the court.

Indian
Companies
Act.

No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or by Royal Charter or Letters Patent; and no company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual

Limitation
of partner-
ships.

members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act or of Letters Patent (a).

Joint-stock
companies.

A joint-stock company shall be deemed to be a company having a permanent paid up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital or the holders of such stock, and no other persons; and such company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares (b).

Mode of
forming
company.

Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration form an incorporated company with or without limited liability (c).

Memo of
association.

The memorandum of association must declare among other things the objects for which the proposed company is to be established (d).

(a) Act VI of 1882, sec. 4.

(b) Sec. 226, *ibid.*

(c) Sec. 6, *ibid.*

(d) Sec. 8, 9, *ibid.*

The powers of a company depend on its memorandum of association (e). The objects must be set out with reasonable clearness and it is not sufficient if a large number of very wide powers are mentioned as such objects (f). The powers of a company to transact business are restricted to the objects specified in the memorandum and any act which is beyond the objects so specified is *ultra vires* (g). But an act which is within the memorandum but forbidden by the articles may be ratified by the shareholders (h), though a contract which is *ultra vires* the memorandum is wholly void and cannot be validated as against the corporation even though it is assented to by every individual member of the corporation (i).

When a company was formed with the object of doing the business of commission agency and general trading in cotton, &c., and when its memorandum laid down "if found desirable, the company may effect purchases of cotton and produce in Bombay and ship to

(e) *Shamnugger Jute Factory Co. v. Ramnarain*, 1 I. L. R. 14 Cal. 189.

(f) *In re German Date Coffee Co.*, 20 Ch. D. 169.

(g) *Ashbury Carriage Co. v. Riche*, 7 H. L. 653.

(h) *Irvine v. Union Bank of Australia*, 2 A. C. 366, *Dixon v. Evans*, L. R. 5 H. L. 606.

(i) *Wentlock v. River Dee Co.*, 36 Ch. D. 675; *Towers v. African Tug*, (1904), 1 Ch. 558. See also *G. N. W. C. Railway Co. v. Charlebois*, (1899) A. C. 114.

England and carry on such local trade as may seem profitable," it was held that the memorandum did not justify the directors in dealing in the shares of other companies and that it was *ultra vires* (j). Where the memorandum of association authorised the company to acquire gold mines in Mysore and elsewhere, and the company gave up its mining operation in Mysore the provision for the acquisition of gold mines "elsewhere" would not enable it to work gold mines on the Gold Coast (k).

Where the objects of a company were stated to be the purchase of the business of hotel-keeper, confectioner and provisioner, the future working and carrying on of the said business and the doing of all such things incidental or conducive to the attainments of the above objects, it was held that the directors had powers to bind the company by the issue of negotiable securities in the ordinary course of business (l).

Articles of
association.

The memorandum of association may in the case of a company limited by shares, and shall in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by

(j) *Kathiawar Trading Co. v. Virchand Dipchand*, I. L. R. 18 Bom. 119.

(k) *Stephens v. Mysore Reef, etc.*, (1902) 1 Ch. 745.

(l) *Choonilal v. Spence's Hotel Co.*, 1 B. L. R. (O.C.) 14.

the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient (*m*).

If the articles empower the directors to deal with the profits either by declaring a dividend or appropriating it to the reserve fund, the directors can add to the existing reserve fund a portion of the profits though it may have the effect of diminishing the amount of dividend which they could otherwise have declared (*n*). Where the articles of association of a limited company authorised its directors to borrow on bond, mortgage, or other security, or otherwise up to a certain limit, with the sanction of the share-holders, it was held that the power justified a mortgage, the object of which was in part to cover previously incurred liabilities, provided the principal amount of the loan did not exceed the limit fixed in the power (*o*). Where the memorandum of association contained a condition that A and B and their representatives were to be secretaries, but the emoluments and powers of the secretaries were set out in the articles of association, it was held that that portion of the articles of association could not be read as part of the

(*m*) Act VI of 1882, sec. 37.

(*n*) *B. B. Trading Corporation, Ltd. v. Dorabji*, I. L. R. 10 Bom. 415.

(*o*) *Kernot v. Walton*, I. L. R. 9 Cal. 14.

memorandum of association so as to preclude its alteration by special resolution under section 76 (p).

Special resolution.

A resolution passed by a company under this Act shall be deemed to be special whenever the resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote, as may be present in person or by proxy (in cases where by the regulations of the company proxies are allowed) at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote, as may be present in person or by proxy at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed (q).

Power to alter memorandum.

Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed,

(p) *Chidambaram v. Krishna Aiyengar*, 5 M. L. T. 290.

(q) Act VI of 1882, sec. 77.

or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as hereinafter provided, no alteration shall be made by any company in the conditions contained in its memorandum of association (r).

Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the court is registered by the registrar of joint-stock companies, as is hereinafter mentioned (s).

It is beyond the powers of directors to cancel shares duly allotted to a share-holder at his request and such a cancellation amounts to a reduction not authorised by the Act and is illegal (t).

(r) Sec. 12, *ibid.*

(s) Sec. 13, *ibid.*

(t) *Sorabji v. Ishwardas*, I. L. R. 20 Bom. 654.

In *Bhimbai v. Ishwardas Jugjiwandus* (u) the Nawab of Beyla Spinning, Weaving and Manufacturing Company, Limited, was registered under the Indian Companies Act (X of 1866). The original capital of the company consisted of Rs. 4,00,000, divided into 1,600 shares of Rs. 250 each. In 1882 the capital of the company was increased by Rs. 1,00,000 divided into 1,600 shares of Rs. 62-8. The resolution to increase the capital was not passed in accordance with the articles of association, *i.e.*, "with the sanction of a special resolution of the company passed at a general meeting." On the 5th November 1884 a resolution was passed at a general meeting of the company that the share-holders should take up the 459 shares of the original capital and 1,027 shares of the increased capital, which were then in the hands of the company, in the proportion of one share to every two shares already held by them. In pursuance of this resolution the appellants took up several shares of the original capital as well as of the new capital. On the 19th October 1885 a general meeting of the company was held at which it was resolved that the resolution of the 5th November 1884, and all acts done in connection with it should be set aside, that the shares taken by the share-holders in pursuance of that

(u) I. L. R. 18 Bom. 152.

resolution should be taken back by the company, and such amounts as had been paid by them on those shares should be credited to their names in the company's books. This was accordingly done, and the shares were transferred to the name of the company. In October 1886, the company was wound up by order of the court. In settling the list of contributories, the district judge of Surat held that the appellants were liable, as contributories, in respect of all the shares which they had taken up in pursuance of the resolution of the 5th November 1884. On appeal from this decision, it was held that with respect to the shares of the original capital the resolution of the 19th October 1885, was illegal and invalid; it operated not as an investment by the company of its funds in its own shares but as an extinguishment of the shares, and such extinguishment was virtually a reduction of the capital, which could not be done without complying with the provisions of section 13 of the Indian Companies Act (VI of 1882); the holders of such shares were, therefore, properly placed on the list of contributories. It was also held that the issue of the shares of the new capital had not been come to in accordance with the articles of association so that it was open to the company to set aside the resolution of the 5th November 1884, and when it was set aside the persons who held the new

shares ceased to be share-holders and could not be held liable as contributories.

Registration
of transfers
of shares.

A company shall, on the application of the transferor of any share or interest in the company, enter in its register of members the name of the transferee of such share or interest in the same manner, and subject to the same conditions, as if the application for such entry were made by the transferee (*v*).

Power to
close
register.

Any company under this Act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, and in the local official gazette, close the register of members for any time or times not exceeding in the whole thirty days in each year (*w*). The Bank of Bengal was held entitled to refuse to register a transfer of shares when the application was made during the time the transfer books of the Bank were closed under the powers of section 21 of Act XI of 1876 and after notification in accordance therewith (*x*). Where the directors passed a resolution on the 1st October "that up to the time of the next ordinary general meeting, the board approve of all transfers of shares from Dwarkadas Shamji and Ramdas Kessowji or either of them and

(*v*) Act VI of 1882, sec. 29.

(*w*) Sec. 56, *ibid*.

(*x*) *Mothoormohun v. The Bank of Bengal*, 1 L. R. 3 Cal. 292.

the company will transfer the shares standing in their name to the transferees without claiming any lien or without raising any objection," the resolution was *ultra vires* and not binding on the company (y).

Any company may, if authorised by its regulations as originally framed, or as altered by special resolution, do any one or more of the following things, namely—

Calls upon
shares.

- (a) making arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls ;
- (b) accepting from any member of the company who assents thereto the whole or a part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him or without any call having been made ;
- (c) paying dividend in proportion to the amount paid upon each share in cases where a larger amount is paid upon some shares than on others (z).

(y) *In re New Great Eastern S. & W. Co.*, I. L. R. 23 Bom. 685.

(z) Act VI of 1882, sec. 27.

Apart from this section, dividends may not be paid out of capital, and any such payment is an *ultra vires* act on the part of the directors of a company and constitutes a breach of trust, rendering them liable to make good to the company any amount so paid (a).

Contracts.

Contracts on behalf of any company under this Act may be made as follows, that is to say :—

- (a) any contract, which, if made between private persons, would be by law required to be in writing, and if made according to English Law, to be under seal, may be made on behalf of the company in writing under the common seal of the company; and such contract may be in the same manner varied or discharged;
- (b) any contract, which, if made between private persons, would be by law required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company; and such contract may

(a) *Re Oxford Benefit Building &c., Society*, 35 Ch. D. 502; *Flitcroft's Case*, 21 Ch. D. 519; *Masonic &c., Assurance Co. v. Sharpe*, (1892) 1 Ch. 154.

in the same manner be varied or discharged ;

- (c) any contract, which, if made between private persons, would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company ; and such contract may in the same way be varied or discharged. And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors or administrators, as the case may be (b).

Under section 21 of the Specific Relief Act (I of 1877) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers cannot be specifically enforced. As an illustration, if a company existing for the sole purpose of making and working a railway contracts for the purchase of a piece of land,

(d) Act VI of 1882, sec. 67.

for the purpose of erecting a cotton mill thereon, the contract cannot be specifically enforced.

No contract can bind a company, which had been entered into with regard to it, when as yet it had no existence. Even if such contract is embodied in the articles of association, it cannot bind the company when formed, unless it has, after its formation, ratified and adopted it (c).

The authority to contract on behalf of a company may be express or implied. Directors and managers have in some companies express authority to contract on their behalf and such authority will be implied with regard to all matters in the ordinary course of business (d).

When the articles of association of a certain company authorised its directors to borrow, from time to time, in the name of the company, such sums of money 'by bonds, debentures, or promissory notes, or in such other manner as they deem best,' it was held that, although the power to borrow money on bills of exchange was not specifically given, yet, they, being in many respects analogous to promissory

(c) *Imperial Flour Mills Co., Ltd. v. W. T. Lamb*, I. L. R. 12 Bom. 647. *Imperial Ice Manufacturing Co., Ltd. v. Munchershaw*, I. L. R. 13 Bom. 415; see also *Guzerat S. & W. Co., Ltd. v. Girdharlal*, I. L. R. 5 Bom. 425.

(d) *Re Cunningham & Co.*, 36 Ch. D. 532.

notes, must be deemed to be included in the general words "or in such other manner as they deem best"(e). Where the company had no power to issue bills of exchange or accept re-drafts, the holders of those drafts which had been, in fact, accepted were in no better position than the holders of unaccepted ones (f).

An authority empowering the agents to "draw, endorse and negotiate on behalf of the company all such cheques as should be necessary for enabling them to carry on the company's business" does not empower them to accept bills drawn on the company (g).

So far as third parties are concerned a company under this Act can be made liable on a bill or note only when such bill or note on the face of it expresses that it was made, accepted, or endorsed by, or on behalf of, or on account of, the company, or where that fact appears by necessary inference from what the face of the instrument itself shows.

The addition to the signature of individuals as makers, drawers, acceptors or endorsers of notes or bills, of their description as director or secretary, treasurer and agent of a certain company, is not considered to raise such

(e) *In re New Fleming S. & W. Co.*, I. L. R. 3 Bom. 439.

(f) *In the matter of the Port Canning & Co., Ltd.*, 7 B. L. R. 583.

(g) *The Oriental Bank Corpn. v. The Barea Tea Co. Ltd.*, I. L. R. 9 Cal. 880.

inference, as it does not exclude the supposition that though described as directors, etc., they intended to make themselves personally liable to holders of the instrument, though, as between themselves and the company, they may be entitled to be indemnified for anything they may have paid on account of the company in respect of such notes or bills (*h*).

Power to
appoint
inspectors.

Any company under this Act may, by a special resolution, appoint inspectors for the purpose of examining into the affairs of the company.

Power to
refer to
arbitration.

Any company under this Act may, from time to time, by writing under its common seal, agree to refer, and may refer, to arbitration any matter whatsoever in dispute between itself and any other company or person; and the companies, parties to the arbitration, may delegate to the person or persons, to whom the reference is made, power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies (*i*). The companies jointly, but not otherwise, from time to time, by writing under their respective common seals, may add to, alter, or revoke any agreement for reference in accordance with this Act

(*h*) I. L. R. 3 Bom. 439, following, *Dutton v. Marsh*, L. R. 6 Q. B. 361.

(*i*) Act VI of 1882, sec. 96.

theretofore entered into between the companies, or any of the terms, conditions or stipulations thereof (*j*).

No company under this Act shall have power to buy its own shares (*k*). A purchase by a Bank of its own shares is *ultra vires* and is not a legal transaction. The Official Liquidator is competent to raise pleas going behind the deposit receipt and he is not bound to question the validity of the purchase by a proceeding under the Companies Act or by a regular suit as the transaction is wholly void and *ultra vires* and do not require to be specially set aside. Neither acquiescence nor ratification by the head manager could validate the same so as to bind the share-holders who had no notice of the same (*l*).

Power to
buy own
shares.

In *Jehangir Rastamji v. Shamji Ladha* (*m*) it was held that the purchase by the directors of a joint-stock company on behalf of the company, of shares in other joint-stock companies, unless expressly authorised by the memorandum of association, was *ultra vires* and that a joint-stock company, even though it be empowered by its memorandum of association to deal in the shares of other companies, was not thereby

(*j*) Sec. 97, *Ibid*.

(*k*) Sec. 249, *Ibid*.

(*l*) *Tronson v. Official Liquidator, Punjab Bank*, 38 P. R. 1881.

(*m*) 4 B. H. C. R. 185.

empowered to deal in its own shares, and a purchase by the directors of the company of its own shares on behalf of the company was, therefore under such circumstances *ultra vires*. Referring to some English cases, the learned judges said :

“ In the case of *Evans v. Coventry* (*n*), before Vice-Chancellor Kindersley, which was a suit by certain persons assured in the General Life Assurance Company to compel the directors to restore the capital expended in the purchase of shares of the company, the Vice-Chancellor seems to have assumed that, as there was no express authority to the directors to buy shares for the company, the purchases were *ultra vires* ; and then proceeds to give other reasons, having special reference to the relation of trustee and *cestui que trust* which he had previously decided was created between the directors and the insured. In *Spackman's Case* (*o*), before Lord Westbury, and in *Stanhope's Case* (*p*), before Lord Cranworth, it was assumed that the sales to the directors, unless they could be regarded as effected under the power to compromise, were *ultra vires*, and the important question was whether the company was estopped by lapse of time and by other circumstances from disputing the validity of the sales.”

(*n*) 25 L. J. (Ch.) 489.

(*o*) 34 L. J. (Ch.) 321.

(*p*) (1865) 1 Ch. App. 161 (1869).

The business of the company shall be managed by the directors who may pay all expenses incurred in getting up and registering the company and may exercise all such powers of the company as are not, by the Indian Companies Act, or by the articles annexed to it, required to be exercised by the company in general meeting, subject nevertheless to any regulations of the said articles, to the provisions of the said Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made (l).

The general authority of directors acting as a board extend to all acts reasonably necessary for management (m). When the articles provide that the directors shall not have power to do a certain act, any resolution of the company authorising the company to do such acts must be a special resolution altering the articles. But if the directors do such an act without authority, the company can by ordinary resolution adopt the act so that it shall become binding on the company (n).

(l) Act VI of 1882, Sch. I, (55).

(m) *Re West of England Bank Exp. Booker*, 14 Ch. D. 317.

(n) *Grant v. United Kingdom Switchback Ry. Co.*: 40 Ch. D. 135.

In *In the matter of the New Great Eastern Spinning & Weaving Co. Ltd. (o)*, by the articles of association of the new Great Eastern Spinning & Weaving Company transfers of shares in the company were subject to the approval of the directors. On the 18th October 1898, the directors passed a resolution "that up to the time of the next ordinary general meeting the Board approve of all transfers of shares made by Dwarkadas Shamji and Ramdas Kessowji (two of the shareholders) or either of them, and...will transfer shares standing in the name of Dwarkadas Shamji and in the name of Ramdas Kessowji to their or his transferees without claiming any lien or raising any objection." It was held that the above resolution was *ultra vires* and not binding on the company. The power conferred on the directors by the articles of association was a fiduciary power to be exercised for the benefit of the company, and could not be exercised until the question of each transfer, together with the names of the transferor and the transferee, was before them and they had an opportunity of considering each case.

Powers of
directors.

The ratification by a company of particular acts done by its directors in excess of their authority does not extend the powers of

(o) I. L. R. 23 Bom. 685 following *Bennett's case*, 5 DeG. M. & G. 284.

the directors so as to give validity to acts of of a similar character done subsequently (p).

In *Ashbury Carriage Company v. Ritche* (q), the question is discussed at great length and a distinction was drawn between acts *ultra vires*, not only of the directors of the company, but of the company itself and acts which are *extra vires* the directors, but *intra vires* the company. The first cannot be ratified, because they are beyond the powers given by law, either as being against public policy or prohibited by statute, or because their admission would be unjust to the public, or because they are inconsistent with, or foreign to, the object expressed in the memorandum of association. The second class applies to cases where the directors have gone beyond the powers entrusted to them; but still the acts are not beyond the objects of the memorandum of association, and may be validated by the sanction of the company. This second class is capable of ratification.

Where, under the articles, the directors were empowered, before recommending a dividend, to set aside out of the profits of the company, as they thought proper, a reserve fund, and the disposal of profits was entirely entrusted to them : to allow the shareholders to deal with

(p) *Irvine v. Union Bank of Australia*, 2 A. C. 366.

(q) 7 H. L. 653. *The New Fleming, S. & W. Co., Ltd.*
v. Kessowji Naik, I. L. R. 9 Bom. 373.

them would be a direct contravention of the article. Nor could the shareholders decide the question as to the amount of the dividend. The remedy of the shareholders, if they were dissatisfied with the directors, was to remove them from office, or to alter the articles of association (r).

Forfeiture
of shares.

A forfeiture of shares which is not illegal as in contravention of any statute but may have been *ultra vires* the directors as being unauthorized by the articles, may be made good if it be shown that every individual shareholder had knowledge of and acquiesced in the transaction (s).

If a forfeiture be *ultra vires* no lapse of time alone can render it valid : - *Quod ab initio non valet, in tractu temporis non convalescit* (t).

As regards a forfeiture which is *ultra vires* the directors, "if a declaration of forfeiture proceeds upon and is the result of a collusive agreement, but is entered by the directors in the books of the company as if it were a *bonâ fide* adverse proceeding, the entry is a false statement involving a fraudulent concealment of the truth, for the suppression of the truth is a form of falsehood, and falsehood is fraud, and it is impossible under such circumstances

(r) *The B. B. Trading Corpn., Ltd. v. Dorabji*, I. L. R. 10 Bom. 415.

(s) *Brotherhood's Case*, 31 L. J. (Ch.) 861.

(t) *Spackman v. Evans*, I. L. R. 3 H. L. 171.

of imposition on the other shareholders, that the shareholder who sets up the forfeiture can make a case of acquiescence or derive any benefit from lapse of time whilst the truth remains unknown" (u).

Directors are responsible for the management of their company. Where, by the articles of association, the business is to be conducted by the Board with the assistance of an agent, they cannot divest themselves of their responsibility by delegating the whole management to the agent and abstaining from all enquiry. If he proves unfaithful under such circumstances, the liability is theirs, just as much as they themselves had been unfaithful (v).

Delegatio

Subject to the provisions of this Act and to the conditions contained in the memorandum of association, any company formed under this Act or the Indian Companies Act, 1860, may, in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association, or in the table marked A in the first schedule, where such table is applicable to the company, or make new regulations to the

Power to
alter
regulation

(u) *Per* Westbury, L. C., in *Spackman's Case*, 34 L. J. (Ch.) 321, 333.

(v) *The New Fleming S. & W. Co., Ltd. v. Kessowji Naik*, 1. L. R. 9 Bom. 373.

exclusion of, or in addition to, all or any of the regulations of the company.

Any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution (*w*).

Winding up
by Court.

A company under this Act may be wound up by the court as hereinafter defined under the following circumstances (that is to say): -

- (a) whenever the company has passed a special resolution requiring the company to be wound up by the court;
- (b) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year;
- (c) whenever the members are reduced in number to less than seven;
- (d) whenever the company is unable to pay its debts;
- (e) whenever for any other reason of a like nature the court is of opinion that it is just and equitable that

(*w*) Act VI of 1882, sec. 76.

the company should be wound up (x).

A company under this Act may be wound up voluntarily— Winding up voluntarily.

(a) whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which, it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily ;

(b) whenever the company has passed a special resolution requiring the company to be wound up voluntarily :

(c) whenever the company has passed an extraordinary resolution to the effect that it has been proved to its satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same.

For the purposes of this Act any resolution shall be deemed to be extraordinary which

(x) Act VI of 1882, sec. 128

is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution as hereinbefore defined (y).

(y) *Ibid.* sec. 173.

LECTURE XI.

Companies.

Among commercial companies for which the Indian legislature has specially provided are the railway companies and the Presidency Banks. The Indian Railway Act (IX of 1890) consolidated the law relating to railways in India. That Act lays down the limits of the powers exercisable by railway administrations in the matter of transport of goods and passengers and of construction and repair of the ways or other works connected therewith.

Indian Rail-
ways

A railway administration may—

Authority
to execute
all neces-
sary works.

- (a) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines of railway, ways, passages, conduits, drains, piers, cuttings and fences as the railway administration thinks proper ;

- (b) alter the course of any rivers, brooks, streams or water-courses, for the

purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them, and divert or alter, as well temporarily as permanently, the course of any rivers, brooks, streams, or water-courses or any roads, streets or ways, or raise or sink the level thereof, in order the more conveniently to carry them over or under or by the side of the railway, as the railway administration thinks proper ;

- (c) make drains or conduits into, through or under any lands adjoining the railway, for the purpose of conveying water from or to the railway ;
- (d) erect and construct such houses, warehouses, offices and other buldings and such yards, stations, wharves, engines, machinery, apparatus and other works and conveniences as the railway administration thinks proper ;
- (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them, and substitute others in their stead ; and
- (f) do all other acts necessary for making, maintaining, altering or repairing and using the railway (a).

(a) Act IX of 1890, sec. 7.

Lands acquired by a railway company must be used for the purposes of the Act only, and if they use them for other purposes they can be restrained by injunction (b).

In a suit against a railway company for compensation for damages caused to the plaintiff's lands adjacent to the railway line by negligently allowing rain water to be flooded in the making of a railway, by constructing burrow pits, in such a way as to be contiguous, they acting as channels for water to pass along the line, it was held that as the defendants had exceeded the powers conferred upon them, they were liable for negligence and the suit was maintainable (c).

A railway administration may, for the purpose of exercising the powers conferred upon it by this Act, alter the position of any pipe for the supply of gas, water or compressed air or the position of any electric wire, or of any drain not being a main drain :

Alteration
of pipes,
wires and
drains.

Provided that—

- (a) when the railway administration desires to alter the position of any such pipe, wire or drain it shall give reasonable notice of its intention to

(b) *Bostock v. North Staffordshire Ry. Co.*, 3 Sm. & Giff 283; *Norton v. L. & N. W. Ry. Co.*, 9 Ch. D. 623.

(c) *Gaekwar of Baroda v. Gandhi Kachruabhai*, I. L. R. 27 Bom. 344.

do so, and of the time at which it will begin to do so, to the local authority or company having control over the pipe, wire or drain or when the pipe, wire or drain is not under the control of a local authority or company, to the person under whose control the pipe, wire or drain is ;

- (b) a local authority, company or person receiving notice under proviso may send a person to superintend the work, and the railway administration shall execute the work to the reasonable satisfaction of the person so sent and shall make arrangements for continuing during the execution of the work the supply of gas, water, compressed air or electricity or the maintenance of the drainage, as the case may be (d).

Removal of
dangerous
or obstructive
trees.

In either of the following cases, namely : (a) where there is danger that a tree standing near a railway may fall on the railway so as to obstruct traffic, or (b) when a tree obstructs the view of any fixed signal, the railway administration may, with the permission of any magistrate, fell the tree or deal with it in such other manner as will in the opinion of the

(d) - Act IX of 1890, sec. 8.

railway administration avert the danger or remove the obstruction, as the case may be. In case of emergency the power mentioned above may be exercised by a railway administration without the permission of a magistrate (e).

A railway administration may, with the previous sanction of the Governor-General in Council, use upon a railway locomotive engine or other motive power, and rolling-stock to be drawn or propelled thereby. But rolling-stock shall not be moved upon a railway by steam or other motive power until such general rules for the railway as may be deemed to be necessary have been made, sanctioned and published under this Act (f).

Right to use locomotives.

A railway administration may charge reasonable terminals (g).

Power to charge terminals.

In *Laljibhai Shamji and others v. G. I. P. Railway Company* (h), the plaintiffs sued to recover from the defendants the sum of Rs. 1,34,152-11, which during the three years prior to suit the plaintiffs had been obliged by the defendants to pay as "terminal charges" on consignments of cotton made by the plaintiffs from up-country stations to Bombay.

(e) *Ibid.* Sec. 15.

(f) *Ibid.* Sec. 16.

(g) *Ibid.* Sec. 45.

(h) I. L. R. 15 Bom. 537 ; on appeal I. L. R. 16 Bom. 434.

By the Act of Incorporation of the defendant company it was enacted that it should be lawful for the railway company and the East India Company to enter into such contracts, &c., as they thought fit, (*inter alia*) "for performing all matters and things necessary or convenient for carrying into effect the making, maintaining and working the railway including any provision as to tolls, receipts and profits thereof." Subsequently the defendant company and the East India Company entered into an agreement with each other, under which the defendant company was empowered to make certain charges called "terminal charges"—charges which are levied on account of the carrying of goods to and from the waggons, loading and unloading them on and from the waggons, and for the use of the company's premises till the goods are removed. The plaintiffs objected to these charges as not being within the scope of the powers conferred by the Act of Incorporation of the defendant company. It was held, that these charges were within the authority given by that Act, and that such charges, if not strictly "tolls," were certainly charges for performing of services, if not "necessary," at any rate "convenient for the working of the railway."

Power to
make general
rules.

(1) Under section 47 every railway company and, in the case of a railway administered

by the Government, an officer to be appointed by the Governor-General in Council in this behalf, shall make general rules consistent with this Act, for the following purposes, namely :—

- (a) for regulating the mode in which, and the speed at which, rolling-stock used on the railway is to be moved or propelled ;
- (b) for providing for the accommodation and convenience of passengers and regulating the carriage of their luggage ;
- (c) for declaring what shall be deemed to be, for the purposes of this Act, dangerous or offensive goods, and for regulating the carriage of such goods ;
- (d) for regulating the conditions on which the railway administration will carry passengers suffering from infectious or contagious disorders, and providing for the disinfection of carriages which have been used by such passengers ;
- (e) for regulating the conduct of the railway servants ;
- (f) for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner ; and,

(g) generally, for regulating the travelling upon, and the use, working and management, of the railway.

(2) The rules may provide that any person committing a breach of any of them shall be punished with fine which may extend to any sum not exceeding fifty rupees, and that in the case of a rule made under clause (e) of sub-section (1), the railway servant shall forfeit a sum not exceeding one month's pay, which sum may be deducted by the railway administration from his pay.

(3) A rule made under this section shall not take effect until it has received the sanction of the Governor-General in Council and published in the Gazette of India.

Provided that, where the rule is in the terms of a rule which has already been published at length in the Gazette of India, a notification in that Gazette referring to the rule already published, and announcing the adoption thereof, shall be deemed a publication of a rule in the Gazette of India within the meaning of this sub-section.

(4) The Governor-General in Council may cancel any rule made under this section, and the authority required by sub-section (1) to make rules thereunder may at any time, with the previous sanction of the Governor-General in Council, rescind or vary any such rule.

The Governor-General in Council may make rules consistent with this Act, and any other enactment for the time being in force for all or any of the following purposes, namely—

- (a) for prescribing the forms of the notices mentioned in the last foregoing section, and the particulars of the accident which those notices are to contain ;
- (b) for prescribing the class of accidents of which notice is to be sent by telegraph immediately after the accident has occurred ;
- (c) for prescribing the duties of railway servants, police officers, inspectors and magistrates on the occurrence of an accident (*i*).

Any railway company, not being a company for which the Statute 42 and 43 Victoria, Chapter 41, provides, may from time to time make with the Governor-General in Council, and carry into effect, or, with the sanction of the Governor-General in Council, make with any other railway administration, and carry into effect, any agreement with respect to any of the following purposes, namely—

Power to enter into working agreements

- (a) the working, use, management and maintenance of any railway ;

(i) *Ibid.* Sec. 84.

- (b) the supply of rolling-stock and machinery necessary for any of the purposes mentioned in clause (a) and of officers and servants for the conduct of the traffic of the railway ;
- (c) the payments to be made and the conditions to be performed with respect to such working, use, management and maintenance ;
- (d) the interchange, accommodation and conveyance of traffic being on, coming from or intended for, the respective railways of the contracting parties, and the fixing, collecting, apportionment and appropriation of the revenues arising from that traffic ;
- (e) generally, the giving effect to any such provisions or stipulations with respect to any of the purposes hereinbefore in this section mentioned as the contracting parties may think fit and mutually agree on.

Provided that the agreement shall not affect any of the rates which the railway administrations, parties thereto, are, from time to time, respectively authorised to demand and receive from any person, and that every person

shall, notwithstanding the agreement, be entitled to the use and benefit of the railways of any railway administrations, parties to the agreement, on the same terms and conditions, and on payment of the same rates as he would be if the agreement had not been entered into (j).

Any railway company, not being a company for which the Statute 42 and 43 Victoria, Chapter 41, provides, may from time to time exercise with the sanction of the Governor-General in Council all or any of the following powers, namely :—

Power to establish ferries and roadways.

- (a) it may establish, for the accommodation of the traffic of its railway, any ferry equipped with machinery and plant of good quality and adequate in quantity to work the ferry ;
- (b) it may work for purposes other than the accommodation of the traffic of the railway any ferry established by it under this section ;
- (c) it may provide and maintain on any of its bridges roadways for foot-passengers, cattle, carriages, carts or other traffic ;
- (d) it may construct and maintain roads for the accommodation of traffic passing to or from its railway ;

(j) Act IX of 1890, sec. 50.

Business of
the Banks.

The Bank is authorised to carry on and transact the several kinds of business hereinafter specified (that is to say)—

(a) the advancing and lending money, and opening cash credits, upon the security of—

- (1) promissory notes, debentures, stock and other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland and, in the case of the Bank of Madras. securities of the Government of Ceylon ;
- (2) bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;
- (3) stock or debentures of, or shares in, railway or other companies, the interest whereon shall have been guaranteed by the Secretary of State for India in Council or such securities issued by state-aided railways as the Governor-General in Council may from time to time prescribe ;
- (4) debentures or other securities for money issued by, or on behalf of, any municipal body or any district board, or any body of commissioners for making improvements in any port or of

trustees of any port under the authority of any Act of a legislature established in British India or the Trustees for the Improvement of the City of Bombay under the authority of the City of Bombay Improvement Act, 1898;

- (5) bullion or other goods which, or the documents of title to which, are deposited with, or assigned to, the Bank as security for such advances, loans or credits; and
- (6) accepted bills of exchange and promissory notes indorsed by the payees and joint and several promissory notes of two or more persons or firms unconnected with each other in general partnership;

Provided that such advances and loans may be made, if the directors think fit, to the Secretary of State for India in Council without any specific security;

- (b) the selling and realization of the proceeds of sale of any such promissory notes, debentures, stock-receipts, bonds, annuities, stock,

shares, securities, bullion or goods which, or the documents of title to which, have been deposited with, or assigned to, the Bank as security for such advances, loans or credits, or which are held by the Bank, or over which the Bank is entitled to any lien or charge in respect of any such loan or advance or credit or any debt or claim of the Bank, and which have not been redeemed in due time in accordance with the terms and conditions (if any) of such deposit or assignment ;

- (bb) the advancing and lending money to Courts of Wards upon the security of estates in their charge, or under their superintendence and the realisation of such advances or loans and any interest due thereon, provided that no such advance or loan shall be made without the previous sanction of the Local Government concerned and that the period for which any such advance or loan is made shall not exceed six months ;
- (c) the drawing, discounting, buying and selling of bills of exchange and other negotiable securities payable in India, or * * * in Ceylon;

- (d) the investing of the funds of the Bank upon any of the securities specified in paragraph (a) of this section, clauses (1), (2), (3) and (4), and converting the same into money when required

and from time to time altering, converting and transposing such investments for or into others of the investments above specified ;

Provided that—

- (1) the power of investing in the securities of the Government of Ceylon shall extend only to the Bank of Madras, and
- (2) the total of the assets held at any time by the Bank of Madras either upon the security of, or invested in, securities of the Government of Ceylon in accordance with the authority conferred by paragraph (a), clause (1), or this paragraph, shall not exceed the sum of the deposits held and balances of cash accounts at credit at the Ceylon Branch of the said Bank of Madras ;
- (e) the making, issuing and circulating of bank-post-bills and letters of credit made payable in India, or

* * * in Ceylon, to order, or otherwise than to the bearer on demand ;

(f) the buying and selling of gold and silver, whether coined or uncoined ;

(g) the receiving of deposits and keeping cash accounts on such terms as may be agreed on ;

(h) the acceptance of the charge and management of plate, jewels, title-deeds or other valuable goods on such terms as may be agreed upon ;

(i) the selling and realising of all property, whether moveable or immoveable, which may, in any way, come into the possession of the Bank in satisfaction or part satisfaction of any of its claims ;

(j) the transacting of pecuniary agency business on commission ;

(k) the acting as agent on commission in the transaction of the following kinds of business (namely)—

(1) the buying, selling, transferring and taking charge of any securities, or any shares in any public company ;

(2) the receiving of the proceeds, whether principal, interest or dividends of any securities or shares ;

- (3) the remittance of such proceeds at the risk of the principal by public or private bills of exchange, payable either in India or elsewhere ;
- (l) the drawing of bills of exchange, and the granting of letters of credit payable out of India, for the use of principals for the purpose of the remittances mentioned in the last preceeding clause of this section ;
- (m) the buying, for the purpose of meeting such bills or letters of credit, of bills of exchange payable out of India, at any usance not exceeding six months ;
- (mm) the borrowing of money in India for the purposes of the Bank's business, and the giving of security for money so borrowed by pledging assets or otherwise ;
- (n) and, generally, the doing of all such matters and things as may be incidental or subsidiary to the transacting of the various kinds of business hereinbefore specified ;
- (o) it shall also, be lawful for the Bank under any arrangement or agreement with the Secretary of State for India in Council—

- (1) to act as banker for and to pay, receive, collect and remit money, bullion and securities on behalf of the Government ;
- (2) to undertake and transact any other business which the Government may, from time to time, entrust to the Bank.

And the directors shall have power from time to time to arrange and settle with the Governor-General in Council the terms of remuneration on which such business shall be undertaken by the Bank, and also as to the examination and audit from time to time of the accounts and affairs of the Bank by or on behalf of the Governor-General in Council (*m*).

Contracts

Contracts may be made on behalf of the Bank as follows :—

- (a) any contract, which, if made between private persons, would be by law required to be in writing, and, if made according to English law, to be under seal, may be made on behalf of the Bank in writing under its corporate seal, and such contract may be in the same manner varied or discharged :
- (b) any contract, which, if made between private persons, would be by law

(*m*) Act XI of 1876, sec. 36.

required to be in writing signed by the parties to be charged therewith, may be made on behalf of the Bank by writing signed by any person acting under the express or implied authority of the Bank, and such contract may in the same manner be varied and discharged.

- (c) any contract, which, if made between private persons, would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the Bank by any person acting under the express or implied authority of the Bank, and such contract may in the same manner be varied and discharged; and all contracts made according to the provisions herein contained shall be effectual in law and shall be binding upon the Bank and other parties thereto and their legal representatives (n).

The proprietors and shareholders of the Bank may from time to time by special resolution and with the previous sanction of the Governor-General in Council increase or reduce the capital of the Bank: provided that

Power to in-
crease or
reduce
capital

(n) Act XI of 1876, sec. 9.

no such special resolution shall be deemed to have been passed, unless, at least one-third in number of the proprietors or shareholders, holding at least one-half of the paid-up capital of the Bank for the time being, be present in person or by proxy, and a majority poll by open voting in favour of the said resolution (o).

When any such special resolution to increase the capital has been passed, the directors may, subject to the provisions of this or any other Act for the time being in force regulating such Bank, and to the special direction (if any) given in reference thereto by the meeting at which such resolution has been passed,—

- (a) make such orders as they think fit for the opening of subscriptions towards such increase of capital by the proprietors and shareholders ;
- (b) allow to the proprietors and shareholders such period to fill up the subscription as to the directors seem fit ;
- (c) prescribe the manner in which the proprietors and shareholders shall subscribe and pay into the Bank the proportions of new capital which they may respectively desire to subscribe ; and

(o) Act XI of 1876, sec. 13.

- (d) make such orders as the directors think fit for the disposal and allotment of the amount of new capital that may not be subscribed for and paid up in manner aforesaid (p).

When any such special resolution to reduce the capital has been passed, the directors may (subject as aforesaid) prescribe the manner in which the reduction shall be carried into effect (q).

The directors may from time to time close the register and transfer-books of the Bank for any period or periods not exceeding in the whole thirty days in any twelve consecutive months (r).

Power to close transfer books

The directors shall not transact any kind of banking business other than those above specified, and in particular they shall not make any loan or advance (s)—

Restrictions on business.

- (a) for a longer period than six months ;
or

- (b) upon the security of stock or shares of the Bank of which they are directors ; or

- (c) save in the case of the estates specified in section 36, paragraph (bb),

(p) *Ibid.* Sec. 14.

(q) *Ibid.* Sec. 15.

(r) *Ibid.* Sec. 21.

(s) Act XI of 1876, sec. 37.

upon mortgage, or in any other manner upon the security, of any immoveable property, or the documents of title relating thereto ;

(d) nor shall they (except upon the security mentioned in section 36, paragraph (a), Nos. 1 to 5 inclusive) discount bills for any individual or partnership firm for an amount exceeding in the whole at any one time such sum as may be prescribed by the bye-laws for the time being in force, or lend or advance in any way to any individual or partnership firm an amount exceeding in the whole at any one time such sum as may be so prescribed ;

(e) nor shall they discount or buy, or advance and lend, or open cash-credits on the security of any negotiable instrument of any individual or partnership-firm, payable in the town or at the place where it is presented for discount, which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership.

(f) nor shall they discount or buy, or advance and lend, or open

cash-credits on the security of any negotiable security having at the date of the proposed transaction a longer period to run than six months or, if drawn after sight, drawn for a longer period than six months.

Nothing contained in this Act shall be deemed to prevent the directors from allowing any person who keeps an account with the Bank to overdraw such account, without security, to the extent of such sums not exceeding at one time ten thousand rupees in the whole as may be prescribed for the time being by the bye-laws made under this Act (t).

An account of the profits of the Bank during the previous half-year shall be taken on or immediately after every thirty-first day of December and every thirtieth day of June, and a dividend shall be made as soon thereafter as conveniently may be, and the amount of such dividend shall be determined by the directors, subject to the provisions of section 45. No paid dividend shall bear interest as against the Bank (u).

Dividends.

The directors, before declaring any dividend, may set aside out of the profits of the Bank such a sum as they think proper as a

Reserve-fund.

(t) *Ibid.* Sec. 37.

(u) *Ibid.* Sec. 44.

reserve-fund, and invest the same upon any of the securities specified in section 36, paragraph (a), clause (1), (2), (3) and (4) (v). The directors may from time to time apply such portion as they think fit of the reserve-fund to meet contingencies, or for equalising dividends, or for any other purposes of the Bank, which they from time to time deem expedient (w).

Powers of
appoint-
ment.

The directors shall have power to appoint such officers, clerks and servants as may be necessary to conduct the business of the Bank, to grant salaries, pensions and other emoluments to such officers, clerks and servants, and to suspend or remove any officer, clerk or servant of the Bank. (x)

Powers in
suits.

The directors may institute, conduct, defend, compromise, refer to arbitration and abandon legal and other proceedings, and claims by or against the Bank or the directors or officers of the Bank, and otherwise concerning its affairs. (y)

Power of
directors to
make bye-
laws.

The directors shall as soon as may be make, and may from time to time alter, bye-laws regulating the following matters or any of them :—

(a) the maximum amount which may be advanced or lent to or for

(v) *Ibid.* Sec. 45.

(w) *Ibid.* Sec. 46.

(x) *Ibid.* Sec. 32.

(y) *Ibid.* Sec. 64.

which bills may be discounted for any individual or partnership without the security mentioned in section 36, paragraph (a) Nos. (1) to (5) inclusive, and the extent of the sums to which accounts may be overdrawn without security under the provisions of the last paragraph of section 37;

- (b) the circumstances under which alone advances may be made to directors or officers of the Bank, or the relatives of such directors or such directors or officers, or to companies, firms or individuals with which or with whom such directors, officers or relatives are connected as partners, directors, managers, servants, shareholders or otherwise;
- (c) the particulars to be contained in the half-yearly balance-sheet.

The directors may from time to time make bye-laws regulating the following matters or any of them :—

- (d) the distribution of business amongst the directors;
- (e) their remuneration;
- (f) the delegation of any powers of the directors to committees consisting of members of their body;

- (g) the procedure at the meetings of the board or of any committee of the directors ;
- (h) the books and accounts to be kept at the head and other officers respectively ;
- (i) the reports and statements to be prepared and made by the chief accountant, the heads of departments, and the other officers of the Bank ;
- (j) the management of the branches and agencies ;
- (k) the fees payable for certificates of shares or receipts for stock, or for registration of transfers of shares or stock ;
- (l) the renewal of certificates of shares and receipts for stock, which have been worn out or lost ;
- (m) and, generally, for the conduct of the business of the Bank :

Provided that no bye-law or alteration or rescission of any bye-law, shall be of any validity except in so far as the same is consistent with the provisions of this Act, and has been previously approved by the Governor-General in Council, and such approval has been signified in writing under the hand of a Secretary to the Government of India. (z)

LECTURE XII.

Quasi-Corporations.

We shall now consider what have been often designated *Quasi*-corporations. They include various associations and societies having some but wanting others of the characteristics of true corporations. Quasi-corporations.

Quasi-corporations in England have been thus classified by Brice: (a). As classified in England.

“The first includes most, perhaps all, of the commissioners instituted for public purposes. These are either made corporations to all intents, or, so far erected into corporations, that the powers given to them, the duties imposed on them, and the rights of action acquired by them descend to their successors (b).”

The second class consists of various co-operative associations, some of which only are true corporations, though most of them have legal incidents and capacities which distinguish them from mere partnerships.

The third group of these *quasi*-corporations aggregate is composed of various classes

(a) DOCTRINE OF ULTRA VIRES, p. 23.

(b) See *Conservators of River Tone v. Ash*, 10 B. & C. 349; *A. G. v. Andrews*, 2 Mac. & Gor. 225, 2 H. & T. 431; *Hall v. Taylor*, L. B. & E. 107; *Hartnall v. Rode Coom'rs.*, 4 B. & S. 301; *Mersey Docks and Harbour Board v. Gibbs*, L.R. 1 H. L. 93, see also 10 & 11 Vict. c. 16, (the Commissioners Clauses Act).

of public officials. Churchwardens are one example (c). They have no common seal, (d) and, therefore, cannot bind themselves and their successors; covenants entered into by or with churchwardens being merely personal, and going to and against their executors (e). Like partnerships, they must all join in suing, and notice to or acquiescence by one is notice to or acquiescence by all (f). They may hold chattels, but not lands, (g) and they are the proper persons to sue for injury done to the goods of the parish (h). The churchwardens and overseers have been together constituted a quasi-corporate body for certain purposes, by 9 Geo. 1 c. 7, and 59 Geo. 111 c. 12. The guardians of the poor are another instance of quasi-corporations (i).

(c) *Withnell v. Gartham*, 6 T. R. 396.

(d) *Rex v. Austrey*, 6 M. & Selw. 319; *Ex parte Annesley*, 2 V. & Coll. (Eq. Ex.) 350. *Furnival v. Coombes*, 6 Scott, N. R. 537; *Rew v. Pettet*, 1 A. & E. 196; Compare *Tuffnell v. Constable*, 7 A. & E. 798; *Robinson v. Lewis*, per Brian, C. J., 20 Ed. IV folo 2 pl. 7; and see *Martin v. Nutkin*, 2 P. Wms. 266.

(e) *Withnell v. Gartham*, 6 T. R. 388.

(f) *A. G. v. Ruper*, 2 P. Wms. 125; *Doe dem. Bailey v. Foster*, 3 C. B. 215, 226.

(g) *Evelin's case*, W. Jones, 439.

(h) See *Rex v. Beeston*, 3 T. R. 592; *Gouldsworth v. Knights*, 11 M. & W. 342.

(i) 5 & 6 Will. IV c. 69 and 5 & 6 Vict. c. 57. Compare the judgments in *Jefferys v. Gurr*, 2 B. & Ad. 833; and in *Reg. v. Poor Law Com'rs*, 9 Q. B. 291.

The fourth group is made up of those unincorporated partnerships which have the power to carry on legal proceedings by means of public officers. These, however, in most respects resemble, and often are, pure partnerships.

There are also *quasi*-corporations sole. The Lord Chancellor is an example; so are the Chief Justices of the King's and Common Bench; *e.g.*, a person, who has received a grant of an office from either, may plead the prescriptive right of the grantor. So a sheriff may prescribe to take a fee for a thing which is not within his office; *e.g.*, to take 20*d* of every prisoner acquitted, that not being given for doing his office (*j*).

Many of the statutes regulating friendly societies and other analogous associations have provided that the property shall be vested in the treasurer or secretary for the time being, or in a trustee, and that actions shall be brought by and against him; such person is thereby created a *quasi*-corporation sole (*k*)."

These several classes of *Quasi*-corporations are represented in India and have been constituted or re-organised by the Legislature.

(*j*) 2 Inst. 210; *Coste's case*, 21 Hen. VII 16.

(*k*) *E.g.*, 18 & 19 Vict. c. 63. Compare *Cortridge v. Griffiths*, 1 B. & Ald. 57.

Port Trusts.

Among bodies created for public purposes, are Commissioners appointed for Ports in India. In all provinces the constitution of the body and its powers are almost similar and are regulated by Acts of Legislature (l) In Bengal for instance the Calcutta Port Act (III of 1890) consolidated and amended the law relating to the Port of Calcutta.

Constitution and powers.

Under it a body of Commissioners called "the Commissioners for the Port of Calcutta" has been constituted as a body corporate, with perpetual Succession and a common seal. There are sixteen commissioners partly elected by certain commercial bodies and partly nominated by the Local Government with a Chairman and Vice-Chairman among them. The Commissioners may hold property, may construct and carry out certain specified works, may frame a scale of tolls and charges, may make contracts within certain limitations, may raise loans on debentures and may make rules consistent with the Act for carrying out the purposes of the Act.

The powers of the Board were considered in the *Trustees of the Harbour, Madras v. Best & Co. (m)*. By section 70 of the Madras Harbour

(l) Bengal Act IV of 1887 (Chittagong); Bombay Act VI of 1886 (Karachi); Bombay Act V of 1888 (Aden); Burma Act IV of 1905 (Rangoon); Madras Act II of 1905 (Madras).

(m) 22 Mad. 524.

Trust Act 1886, the Board is empowered to make bye-laws for the reception, removal and portorage of goods. A bye-law framed under this section provided that importers desiring to store cargo must apply to the Secretary of the Board for such space as they might require, and that such applications would be granted on such terms as the Board might approve, and concluded with the reservation that the Board, while taking all reasonable precautions, would accept no responsibility in respect of property stored upon its premises, which would remain at the risk of the consignees or owners. It was held that the provision was not a bye-law for the reception or removal of goods, within the meaning of section 70 of the Act, and was *ultra vires*.

Foremost among Corporations devoted to the advancement of learning are the Universities. In the year 1857, the first Universities in India were founded at Calcutta, Bombay and Madras and in the years 1882 and 1887, the Universities of the Punjab and Allahabad came into being. By the Acts that established these Universities a number of persons, named as the Chancellor, Vice-Chancellor and Fellows are constituted and declared to be one body politic and corporate, with a perpetual succession and a common seal. The body corporate is empowered to take, purchase and hold property and to grant, demise, alien of

Universities

Early Constitution.

otherwise dispose of all or any of the properties belonging to the University. The Chancellor, Vice-Chancellor and Fellows for the time being constitute the Senate of the University. All questions relating to the University shall be decided by a majority of the members in the meetings of the Senate. The Senate shall have full powers to appoint, all examiners, officers or servants, to confer, after examination, the several degrees, in Arts, Law, Medicine and Engineering and to charge reasonable fees for the degrees to be conferred (n).

The Indian
Universities
Act, 1904.

By the Indian Universities Act VIII of 1904 the constitution of the Indian Universities has been revised and remodelled. Under this Act, the objects of the University have been enlarged. The University may make provision for the instruction of students, appoint University Professors and Lecturers, hold and manage educational endowments, erect, equip and maintain University libraries, laboratories, and museums, make regulations relating to the residence and conduct of students, and do all acts consistent with the Act of Incorporation and this Act, which tend to the promotion of study and research.

(n) Act II of 1857; Act XXII of 1857; Act XXVII of 1857; Act XIX of 1882; Act XVIII of 1887.

The Body Corporate shall be the Senate of the University and shall consist of—

Constitution.

- (a) the Chancellor ;
- (b) in the case of the University of Calcutta, the Rector,
- (c) the Vice-Chancellor ;
- (d) the *ex-officio* Fellows ; and
- (e) the Ordinary Fellows—
 - (i) elected by registered Graduates or by the Senate ;
 - (ii) elected by the Faculties, and
 - (iii) nominated by the Chancellor.

The executive Government of the University shall be vested in the Syndicate, which shall consist of—

The Syndicate.

- (a) the Vice-Chancellor as Chairman ;
- (b) the Director of Public Instruction for the Province in which the head-quarters of the University are situated ; and, in the case of the University of Allahabad, also the Director of Public Instruction in the Central Provinces ; and
- (c) not less than seven or more than fifteen *ex-officio* or Ordinary Fellows elected by the Senate or by the Faculties in such manner as may be provided by the regulations to hold office for such period

as may be prescribed by the regulations (o).

Power to
confer
degrees.

The Senate may institute and confer such degrees, and grant such diplomas, licenses, titles and marks of honour in respect of degrees and examinations as may be prescribed by the regulations (p).

Where the Vice-Chancellor and not less than two-thirds of the other members of the Syndicate recommend that an honorary degree be conferred on any person on the ground that he is, in their opinion, by reason of eminent position and attainments, a fit and proper person to receive such a degree and where their recommendation is supported by not less than two-thirds of the Fellows present at a meeting of the Senate and is confirmed by the Chancellor, the Senate may confer on such person the honorary degree so recommended without requiring him to undergo any examination (q).

Where evidence is laid before the Syndicate showing that any person on whom a degree, diploma, license, title or mark of honour conferred or granted by the Senate has been convicted of what is, in their opinion, a serious offence, the Syndicate may propose to the Senate that the degree, diploma, title or mark

(o) *Ibid.* Sec. 15.

(p) *Ibid.* Sec. 16.

(q) *Ibid.* Sec. 17.

of honour be cancelled, and, if the proposal is accepted by not less than two-thirds of the Fellows present at a meeting of the Senate and is confirmed by the Chancellor, the degree, diploma, license, title or mark of honour shall be cancelled accordingly. (r)

The Senate, with the sanction of the Government may from time to time make regulations consistent with the Act of Incorporation as amended by this Act and with this Act to provide for all matters relating to the University. In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for—

Power to
make regu-
lations.

(a) the procedure to be followed in holding any election of Ordinary Fellows ;

(b) the constitution, reconstitution or abolition of Faculties, the proportion in which the members, other than the *ex-officio* members, or the Syndicate shall be elected to represent the various Faculties and the mode in which such election shall be conducted ;

(c) the procedure at meetings of the Senate, Syndicate and Faculties and the quorum of members to be

required for the transaction of business ;

- (d) the appointment of Fellows and others to be members of Boards of Studies, and the procedure of such Board and the quorum of members to be required for the transaction of business ;
- (e) the appointment and duties of the Registrar and of officers and servants of the University, and of Professors and Lecturers appointed by the University ;
- (f) the appointment of examiners, and the duties and powers of Examiners in relation to the examinations of the University ;
- (g) the form of the certificate to be produced by a candidate for examination under section 19 and the conditions on which any such certificate may be granted ;
- (h) the registers of graduates and students to be kept by the University, and the fee (if any) to be paid for the entry or retention of a name on any such register ;
- (i) the inspection of Colleges and the reports, returns and other information to be furnished by Colleges ;

- (j) the registers of students to be kept by Colleges affiliated to the University ;
- (k) the rules to be observed and enforced by Colleges affiliated to the University in respect of the transfer of students ;
- (l) the fees to be paid in respect of the courses of instruction given by Professors or Lecturers appointed by the University ;
- (m) the residence and conduct of students ;
- (n) the courses of study to be followed and the conditions to be complied with by candidates for any University examination, other than an examination for matriculation, and for degrees, diplomas, licenses, titles, marks of honour, scholarships and prizes conferred or granted by the University ;
- (o) the conditions to be complied with by schools desiring recognition for the purpose of sending up pupils as candidates for the matriculation examination and the conditions to be complied with by candidates for matriculation, whether sent up by recognised schools or not ;
- (p) the conditions to be complied with by candidates not being students

of any College affiliated to the University, for degrees, diplomas, licenses, titles, marks of honour, scholarships and prizes conferred or granted by the University ; and

- (q) the alteration or cancellation of any rule, regulation, statute or bye-law of the University in force at the commencement of the Act. (s)

The Soci-
ties Regis-
tration Act

THE SOCIETIES REGISTRATION ACT (XXI of 1860) makes provision for improving the legal condition of societies established for the promotion of literature, science or the fine arts, or for the diffusion of useful knowledge, or for charitable purposes.

Description
of Societies.

The following societies may be registered under this Act :—Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction and the diffusion of useful knowledge, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs (t).

(s) *Ibid.* Sec. 25.

(t) Act XXI of 1860, Sec. 20.

Any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in Section 20 of this Act, may by subscribing their names to a memorandum of association and filing the same with the Registrar of Joint-Stock Companies form themselves into a society under this Act. (*u*).

Constitu-
tion.

The memorandum of association shall contain the following things (that it is to say) :—

Memoran-
dum of
association.

- the name of the society ;
- the objects of the society ;
- the names, addresses, and occupations of the governors, council, directors, committee or other governing body to whom, by the rules of the society, the management of its affairs is entrusted (*v*).

The property, moveable and immoveable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings civil and criminal, may be described as the property of the governing body of such society by their proper title (*w*).

Vesting of
property.

(*u*) *Ibid.* S. 1.

(*v*) *Ibid.* S. 5.

(*w*) *Ibid.* S. 5.

Suit.

Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion :

Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary or the trustees thereof if on application to the governing body some other officer or person be not nominated to be the defendant (x).

Management.

The governing body of the society shall be the governors, council, directors, committee, trustees or other body to whom by the rules and regulations of the society the management of its affairs is entrusted (y).

The Religious Societies Act.

THE RELIGIOUS SOCIETIES ACT (I of 1880) simplified the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purpose. It provides that when any body of persons associated for the purpose of maintaining religious worship has acquired, or hereafter shall acquire, any pro-

(x) *Ibid.* S. 6.

(y) *Ibid.* S. 16.

perty, and the appointment of a new trustee, in the place of or in addition to the old trustees becomes necessary, the property shall vest in such new trustees, as in the old trustees, after appointment by the members of such body at a meeting convened for the purpose.

THE CO-OPERATIVE CREDIT SOCIETIES ACT (X of 1904) was passed to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means and to provide for the constitution and control of co-operative credit societies. To these Societies the Indian Companies Act does not apply.

The Co-operative credit Societies Act.

A society shall consist of ten or more persons above the age of eighteen years; (a) residing in the same town or village or in the same group of village; (b) or subject to the sanction of the Registrar, consisting of members of the same tribe, class or caste. Societies shall be either rural or urban. In a rural society not less than four-fifths of the members shall be agriculturists. In an urban society not less than four-fifths of the members shall be non-agriculturists (z).

Constitution.

No dividend or payment on account of profits shall be paid to a member of a rural society, but all profits made by such a society shall be carried to a fund (to be called the

Reserve fund.

(z) Act X of 1904, S. 3.

reserve fund): Provided that, when such reserve fund has attained such proportion to the total of the liabilities of the society, and when the interest on loans to members has been reduced to such rates, as may be determined by the by-laws or rules made under this Act, any further profits of the society not exceeding three-fourths of the total annual profits, may be distributed to members by way of bonus. Not less than one-fourth of the profits in each year of an urban society shall be carried to a fund (to be called the reserve fund) before any dividend or payment on account of profits is paid to the members or any of them (a).

Power to
receive
deposits
and take
loans.

A society may receive deposits from members without restriction, but it may borrow from persons who are not members only, to such extent and under such conditions as may be provided by its by-laws or by rules made under this Act (b).

Limit on
loans.

A society shall make no loan to any person other than a member.

Provided that, with the consent of the Registrar, a society may make loans to a rural society.

Save with permission of the Registrar to be given by general order in the case of each society, a rural society shall not lend money on the security of moveable property.

(a) *Ibid.* S. 8.

(b) *Ibid.* S. 9.

The Local Government may, by general or special order, prohibit or restrict the lending of money on mortgage of immoveable property or any kind thereof by any society or class of societies (c).

A society may deposit its funds in the Government Savings Bank or with any banker or person acting as a banker approved for the purpose by the Registrar.

Power to deposit.

A member shall not transfer any share held by him or his interest in the capital of the society or any part thereof, unless he has held such share or interest for one year at least.

The share or interest of a member in the capital of a society shall not be transferred or charged, unless to the society or to a member of the society and subject to any conditions as to maximum holding prescribed by this Act or by the by-laws or by any rules made under this Act (d).

Restriction on transfer of shares.

(c) *Ibid.* S. 10.

(d) *Ibid.* S. 14.

ADDENDA.

LECTURE II.

Where a statute prescribes a procedure as a condition precedent to conferring jurisdiction or giving power to do an act, a non-compliance with the requirements of the statute makes the act a nullity.

When a certificate under Section 9 of the Public Demands Recovery Act (I of 1895) did not specify the amount and the space intended for the insertion of the figures was left blank and the certifying officer appeared to have mechanically signed it without perusal or consideration, it is not duly made under the provisions of the Act and a sale held under such a certificate is not valid [*Mohiuddin v. Pirthichand*, 31 I C. 664].

In *Bajjnath v. Ramjat*, [23 Cal. 775=23 I. A. 45 affirming 5 C. L. 687]. Lord Davey observed :—

“ It is obvious that those are very stringent provisions. The proceeding in the first instance is apparently *ex parte*. The certificate is to be made by the Collector in a certain form and filed, and when the certificate is filed, it has the effect of a decree against the persons named as debtors in the certificate so far as regards the remedies for enforcing it, and when served, it also binds their immoveable property. It is unnecessary to point out the necessity there is, when power is given to a public officer to sell the property of any of Her Majesty's subjects, that the forms required by the Act, which are matters of substance, should be complied with. and that if the certificate is to have the extraordinary effect of a decree against the persons named in it as debtors and to have the effect of binding their immoveable property, at least it should be in a form, such as provided by the Act, which enables any person who reads it to see who the judgment-creditor is, what is the sum for which the judgment is given, and that those particulars should be certified by the hand of the proper officer appointed by the Act for the purpose. If no such certificate is given, then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate which has the effect of

a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all." [See also *Mahomed Abdul Hai v. Gujraj Sahai*, 20 Cal. 826=20 I. A. 70, approving *Gujraj Sahai v. Secretary of State*, 17 Cal. 414; *Puranchara v. Dinabandhu*, 34 Cal. 811.]

In order to deprive the proprietor of a permanently-settled estate of his right to take settlement of *Chur* land contiguous to his estate, it is necessary that the provisions of Regulation VII of 1822 should be strictly complied with. In the absence of any report by the Settlement Officer or by the Collector that the settlement of *Chur* land with the proprietor of a permanently-settled estate contiguous to it, who was also the previous holder of the *Chur* would endanger the public tranquillity or otherwise be seriously detrimental the Government have to power to settle the *Chur* with a third party in contravention of Section 3 of Bengal Regulation VII of 1822.* [*Brindaban Chundra v. Karuna Nidhan*, 23 C. W. N. 261=50

• Section 3 of Bengal Regulation VII of 1822 thus "with respect to the estates which are at present let to farm, a settlement thereof shall be made on the expiration of the existing leases for such a period as the Governor-General in Council may direct. A preference shall be given to the Zemindars or other persons possessing a permanent property in the Mahals, if willing to engage for the payment of the public revenue on reasonable terms: Provided also that in cases wherein such Mahals may be let in farm, the term of the lease granted to the farmers shall not exceed 12 years. The above rules shall likewise be applicable to estates now held khas. So in any case, wherein the Zemindars or other proprietors may refuse to continue their existing engagements, or to enter into new engagements, on equitable terms, it shall be competent to the Revenue Authorities to let the lands in farm for such period, not exceeding 12 years, as the Governor General in Council shall appoint, or to assume the direct management of them, and to retain them under khas management during the period aforesaid or such shorter period as may be adjudged proper: Provided further that if in any case it shall appear to the Revenue Authorities that the continuance or admission of any Raja, Zemindar, Talukdar, or other person who may have engaged, or may claim to engage, for any Mahal or Mahals, in or to the management of such Mahal or Mahals, would endanger the public tranquillity or otherwise be seriously detrimental, it shall be their duty to report the circumstances to Government, and it shall be competent to the Governor-General in Council, by an Order in Council, to cause such Mahal or Mahals to be held khas or let in farm, for such term as may appear expedient and proper, not exceeding the period above specified."

I. C. 84. See also *Radhakant v Secretary of State*, 23 C. W. N. 265=50 I. C. 94].

When a taxing authority is called upon to assess the tax based upon annual letting value he does very wrong if he rates as if he were dealing with the question for the income tax [*Mersey Dock and Harbour Board v. Birkenhead Assessment Committee*, (1901) A. C. 175]. So where a Cantonment Magistrate under section 22 of the Cantonments Act (III of 1880) assumes power that the law has not given him and calculates the tax not on the annual value, but on some strange and novel method of his own, the enhancement is *ultra vires* [*Secretary of State v. Major Hughes*, 38 Bom. 293. See also *Kasandas v. Ankleshwar Municipality*, 26 Bom. 294].

A District Magistrate has no jurisdiction to eject any person from property under section 43 of the Bombay District Police Act (IV of 1890) without first taking temporary possession himself and an order prohibiting a person from entering a temple under such circumstances is *ultra vires* [*Dharmibhai v. Emp.*, 45 I. C. 396.]

Where a Sub-Deputy Magistrate not appointed by the Local Government to perform the functions of a Magistrate under the Assam Labour and Emigration Act (VI of 1901) acquitted certain persons of offences under section 164 of that Act, but at the same time passed an order that the proprietor of the garden for which the coolies were recruited should deposit the expenses of repatriation of the coolies, it was held that the "Sub-Deputy Magistrate's orders were entirely without jurisdiction in as much as section 2 of the Act defines the Magistrate as the Magistrate of the District, Sub-Divisional Magistrate or other persons appointed by the Local Government to perform the function of the Magistrate under this Act and this Sub-Deputy Magistrate was not so appointed by the Local Government. His orders are therefore clearly *ultra vires*." [*Emp. v. Ritu Chamar*, 22 I. C. 978. See also *Emp. v. Dattatraya*, 14 I. C. 974].

Similarly when a public body or a Company is established by statute or is incorporated for special purposes only and is altogether the creature of Statute Law the prescription for its acts and contracts is imperative and essential to their validity.

LECTURES III AND IV.

In consequence of the recommendations of Lord Morley, Secretary of State, the Indian Councils Act, 1909 (9 Edw. VII c. 35), made important changes in the constitution and functions of the Indian Legislative Councils and gave power to make changes in the executive Governments of the Indian Provinces. The Government of India Act, 1915 (5 & 6 Geo. V c. 61) consolidated all the statutory provisions relating to the Indian constitution and this was amended by the Amending Act (6 & 7 Geo. V c. 37).

As a result of the Motagu-chelmsford Report, 1918, the Government of India Act, 1919 (9 & 10 Geo. V c. 101) was passed which introduced a considerable measure of reform and laid the foundation for responsible Government in India. The following are the important provisions laying down the powers of the Imperial and Local Legislatures :—

S. 10. (1) The local legislature of any province has power subject to the provisions of this Act, to make laws for the peace and good government of the territories for the time being constituting that province.

(2) The local legislature of any province may, subject to the provisions of the sub-section next following, repeal or alter as to that province any law made either before or after the commencement of this Act by any authority in British India other than that local legislature.

(3) The local legislature of any province may not, without the previous sanction of the Governor-General, make or take into consideration any law—

- (a) imposing or authorizing the imposition of any new tax unless the tax is a tax scheduled as exempted from this provision by rules made under the principal Act ; or
- (b) affecting the public debt of India, or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in Council for the general purposes of the Government of India, provided that the imposition or alteration of a tax scheduled as aforesaid shall not be deemed to affect any such tax or duty or
- (c) affecting the discipline or maintenance of any part of His Majesty's naval, military, or air forces ; or

- (d) affecting the relations of the government with foreign princes or states ; or
- (e) regulating any central subject ; or
- (f) regulating any provincial subject which has been declared by rules under the principal Act to be, either in whole or in part, subject to legislation by the Indian legislature, in respect of any matter to which such declaration applies ; or
- (g) affecting any power expressly reserved to the Governor-General in Council by any law for the time being in force ; or
- (h) altering or repealing the provisions of any law which, having been made before the commencement of this Act by any authority in British India other than that local legislature, is declared by rules under the principal Act to be a law which cannot be repealed or altered by the local legislature without previous sanction ; or
- (i) altering or repealing any provision of an Act of the Indian legislature made after the commencement of this Act, which by the provisions of that Act may not be repealed or altered by the local legislature without previous sanction.

Provided that an Act or a provisions of an Act made by a local legislature, and subsequently assented to by the Governor-General in pursuance of this Act, shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this Act.

(4) The local legislature of any province has not power to make any law affecting any Act of Parliament.

S. 17. Subject to the provisions of this Act, the Indian legislature shall consist of the Governor-General and two Chambers, namely, the Council of State and the Legislative Assembly.

Except as otherwise provided by or under this Act, a Bill shall not be deemed to have been passed by the Indian legislature unless it has been agreed to by both chambers, either without amendment or with such amendments only as may be agreed to by both chambers.

S. 18. (1) The Council of State shall consist of not more than sixty members nominated or elected in accordance with rules made under

the principal Act, of whom not more than twenty shall be official members.

(2) The Governor-General shall have power to appoint, from among the members of the Council of State, a president and other persons to preside in such circumstances as he may direct.

(3) The Governor-General shall have the right of addressing the Council of State, and may for that purpose require the attendance of its members.

S. 19. (1) The Legislative Assembly shall consist of members nominated or elected in accordance with rules made under the principal Act.

(2) The total number of members of the Legislative Assembly shall be one hundred and forty. The number of non-elected members shall be forty, of whom twenty-six shall be official members. The number of elected members shall be one hundred.

Provided that rules made under the principal Act may provide for increasing the number of members of the Legislative Assembly as fixed by this section, and may vary the proportion which the classes of members bear one to another, so, however, that at least five-sevenths of the members of the Legislative Assembly shall be elected members, and at least one-third of the other members shall be non-official members.

S. 27. (1) In addition to the measures referred to in sub-section (2) of section sixty-seven of the principal Act, as requiring the previous sanction of the Governor-General, it shall not be lawful without such previous sanction to introduce at any meeting of either chamber of the Indian legislature any measure—

- (a) regulating any provincial subject, or any part of a provincial subject, which has not been declared by rules under the principal Act to be subject to legislation by the Indian legislature ;
- (b) repealing or amending any Act of a local legislature ;
- (c) repealing or amending any Act or ordinance made by the Governor-General.

(2) Where in either chamber of the Indian legislature any Bill has been introduced, or is proposed to be introduced, or any amendment to

a Bill is moved, or proposed to be moved, the Governor-General may certify that the Bill, or any clause of it, or the amendment, affects the safety or tranquillity of British India, or any part thereof, and may direct that no proceedings, or that no further proceedings, shall be taken by the chamber in relation to the Bill, clause, or amendment, and effect shall be given to such direction.

Where a person has a right of action against the East India Company that right of action cannot be taken away by any Act passed by the Indian legislature, after the possessions of the Company have been vested in the Crown [*Damodar Tukaram v. Secretary of State*, 45 Bom. 1161].

Under section 65 of the Government of India Act, 1858 all persons and bodies public shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council as they could have done against the said Company. The Legislative Council of the Governor-General derives its legislative powers from section 22, Indian Councils Act, 1801 which contains a proviso that the Governor-General in Council shall not have the power of making any laws or regulations which shall affect any provision of the Government of India Act, 1858. The Chief Court held that Section 51 (6) Lower Burma Town and Village Lands Act, did affect the provision of section 65 of the Government of India Act, 1858 inasmuch as it purported to take away the right which was possessed by every one prior to 1858 of bringing suits for land against the East India Company [*J. Moment v. Secretary of State*, 5 L. B. R. 163=8 I. C. 1129]. This judgment was upheld by the Privy Council [*Secretary of State v. J. Moment*, 40 Cal. 391=40 I. A. 48].

Similarly under section 53(2), Upper Burma Land and Revenue Regulation, a Civil Court shall not exercise jurisdiction over any claim to the ownership or possession of any State land or to establish any lien upon or in other interests in such land. In *Mahomed Amin v. Nachiappa Chetty* [8 Bur. L. T. 45=29 I. C. 736], the Judicial Commissioner held that this section was *ultra vires* of the Legislature and said—

“Now the concluding part of section 22 of the Indian Councils Act, 1861 lays down that the Governor-General in Council shall not have the

power to make any law or regulation which shall in any way, affect any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom. I take it that what this means is, no laws shall be made contravening the fundamental principles on which British civilization is based, *e.g.*, freedom of the person, freedom of religion, equality before the law, etc.

Now section 53, Upper Burma Land and Revenue Regulation, seems to be clearly an attempt to intro duce in a mild way into Burma what is known in France as the "*droit administratif*."

Dicey says that this scheme is based on the privilege of the State and of its officers and on its supposed necessity for a separation of power:—"The second of these characteristics is that the ordinary judicial tribunals which determine ordinary questions, whether they be civil or criminal, between man and man, must, speaking generally, have no concern whatever with matters at issue between a private person and the State, *i.e.*, with questions of administrative law, but that such questions, in so far as they form at all matter of litigation (*contentieux administratif*) must be determined by Administrative Courts in some way connected with the Government or the administration." (Dicey's Law of Constitution, 7th Edition, page 335). "The judicial Courts had, speaking generally, no concern with administrative law, or, in other words, with cases in which the interest of the State or its servants was at issue" (page 336). "They, (*i.e.*, ordinary judges) are even now, as a rule, without jurisdiction in matters which concern the State. They have no right to determine, for instance, the meaning and legal effect in case it be seriously disputed, of official documents" (page 338).

This is one of the points taken by the learned Advocate for the respondent, viz., that it is obviously inequitable that the terms of a lease granted by Government should be determined by the Government and not by the Civil Court.

Now it appears that the "*droit administratif*," though it exists in many countries, is fundamentally opposed to English ideas. To quote Dicey again. "That 'rule of law,' then, which forms a fundamental principle of the (English) constitution has three meanings, or may be

regarded from three different points of view . . . It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative Law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the Civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the Law of England, and indeed is fundamentally inconsistent with our traditions and customs" (page 198).

I think it is clear that section 53(2)(ii), Upper Burma Land and Revenue Regulation, does affect one of the unwritten laws referred to in section 22, Indian Councils Act, and is, therefore, *ultra vires*. It may well be that in a backward country, the advantages of the "*droit administratif*" may far outweigh its disadvantages and that it may, therefore, be worth while to introduce such a scheme and the introduction could hardly be taken as a hardship to persons who lived under the old Burmese regime, and in the course of time as the people became more enlightened the operation of the scheme might be gradually restricted as is happening at present in France, but I think it is clear that such a scheme could be introduced by the British Parliament alone.

I accordingly hold that section 53(2)(ii), Upper Burma Land and Revenue Regulation, is *ultra vires* of the Legislature and that the present suit was cognizable by the Civil Courts and I direct that the appeal be now heard on the merits."

The proviso to section 101(2) of the Government of India Act, 1915 must be read as meaning that appointments of temporary judges may be made from time to time for such period not exceeding two years as may be required on each occasion when the power is exercised. The proviso does not mean that as regards each High Court, appointments can only be made for periods not exceeding two years in all [*Kandasami v. Muthu Venkatachala*, 43 I. C. 850.]

Section 12 of the Limitation Act of 1908 is within the legislative powers of the Governor-General in Council and is not *ultra vires* as being in contravention of section 64 of the Government of India Act, 1858 [*Abdullah Hossein v. Administrator-General of Bengal*, 42 Cal. 35].

In *re Abdul Rasul*, 41 Cal. 518, it was not decided whether the condition about the sanction of the Governor-General in Council under section 12 Chapter XI of the Calcutta University Regulations, under Act VIII of 1904 is *ultra vires*. In *Narendranath v. Stephenson* [31 I. C. 619] the question whether the rules framed by the Local Government under section 33 of the Bengal Medical Act (VI of 1914) are *ultra vires* or not was left undecided. Rules 6 and 11 framed by the Local Government under section 15 of the Bengal Municipal Act (II of 1884) in so far as they apply to general elections are *intra vires* [*Molla Ataul Haq v. Chairman, Manicktolla Municipality*, 57 I. C. 960].

A conviction based on Rule 4 (c) of the Rules framed by the Bombay Government under section 5 of the Opium Act (I of 1878) is a rule of evidence as to the fact of possession and not a rule as to the conditions of possession as contemplated by section 5, and as such is *ultra vires* of the section, so that a conviction based on the rule is illegal [*Sandalal v. Emp.* 27 I. C. 1915].

The rule (1), that a notice to parties to a conciliation-agreement should be served through a Subordinate Judge, framed by the Local Government under section 49 of the Dekhan Agriculturists' Relief Act XVII of 1879, and published at page 682, part I, of the Bombay Government Gazette, is not *ultra vires* and a notice so served was held to be a good notice [*Jotiram v. Maniram v. Devba Ishwarappa*, 10 Bom. 189].

The Government of Bombay Resolution dated 6th May 1911 prohibiting *Vyasawtol* processions in the District of Belgaum for all time is illegal and *ultra vires* and is not covered by section 42 or 44 of the Bombay District police Act (IV of 1890). Section 42 limits the powers of prohibition conferred on the Magistrate both in time and place, the limitation of place being to a particular town or village or vicinity thereof. Section 44 (1) deals not with the prohibition of religious ceremonials, but with the maintaining of public order at religious ceremonials which are not prohibited [*Dundappa Mallappa v. Secretary of State*, 18 Bom. L. R. 460 = 37 I. C. 363].

Under sections 35 and 37 of Regulation V of 1804, the Local Government has power to make rules in regard to claims which have not merged into decrees and to extend to such claims the procedure laid down in section 322 (a), (b) and (d) of the Code of Civil Procedure. [*The Regulation Collector of Kalahasti and Karvetnagar Estates v. Ramasami Chetti*, 28 Mad 557].

Rules 6 and 7 of the rules framed under section 35 of Regulation V of 1804 do not authorise the Decree Collector to make a reference to the District Court in respect of the interest to be allowed to a creditor unless there is a dispute as to the fact or extent of liability in regard to the principle matter of the claim, and the question of interest arises as accessory and incidental to the disposal of the main claim. Where the Governor in Council of Fort St. George empowered by Notification all Magistrates of the Second Class to try cases under the Opium Act (I of 1878), it was held that the Act gave a discretion to specially empower Second Class Magistrates with jurisdiction and that the general authorisation was *ultra vires* of the powers granted by the Act, for under the Notification "the Government have exercised powers by which they have enlarged the definition of 'Magistrate' so far as this Presidency is concerned" [*Mahomad Kasim v. Emp.*, 28 I. C. 157].

Under the Assam Labour and Emigration Act (V of 1901) the Government issued a Notification relaxing or dispensing with the requirements of certain sections of the Act in the case of garden sirdars working under the control of Assam Labour Supply Association, and empowering the District Magistrates to cancel license of any local agent for misconduct. This condition was held not to be *ultra vires* of the Government of Madras [*A. M. Ross v. Secretary of State*, 37 Mad. 55].

When an order of the Executive Government is *ultra vires*, it is a mere nullity and suit is necessary to have it set aside [*Balwant Ramchandra v. Secretary of State*, 29 Bom. 480].

LECTURE V.

The Indian High Courts Act, 1911 (1 & 2 Geo. V c. 18) raised the maximum number of Judges and gave power for the establishment of new High Courts and for the appointment of temporary additional Judges. The provisions relating to High Courts were embodied in the Government of India Act, 1915.

The following provisions of C. P. Code, 1908, regarding powers of the High Courts to make rules are important :—

S. 123. (1) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Allahabad, Lahore and Rangoon.

(2) Each such Committee shall consist of the following persons, namely—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years ;

(b) a barrister practising in that Court ;

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court ;

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their member to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be.

S. 124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted or any proposal to

annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

S. 125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor-General in Council may determine :

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

S. 126. Rules made under the foregoing provisions shall be subject to the previous sanction of the following authorities namely—

- (a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, to the sanction of the authority prescribed by section 15 of that Act, for rules made under that section,
- (b) if the rule is made by any other High Court, to the sanction of the Local Government.

S. 127. Rules so made and sanctioned shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

S. 128. (1) Such rules shall be not inconsistent with provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1) such rules may provide for all or any of the following matters, namely—

- (a) the service of summonses, notices and other processess by post or in any other manner either generally or in any specified areas and the proof of such service ;

- (b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property and the proceeds of such sale ;
- (c) procedure in suits by way of counterclaim, and the valuation of such suits for the purposes of jurisdiction ;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts ;
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not ;
- (f) summary procedure—
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising—
 - on a contract express or implied, or
 - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or
 - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ;
 - or on a trust ; or
 - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ;
- (g) procedure by way of originating summons ;
- (h) consolidation of suits, appeals and other proceedings ;
- (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties ; and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

S. 129. Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

S. 130. A High Court not established under the Indian High Courts Act, 1861, may, with the previous sanction of the Local Government, make with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 of that Act, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-Town.

S. 131. Rules made in accordance with section 129 or section 130 shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law.

The rules of the Presidency Small Cause Courts are made by the High Court under the powers conferred by section 9 of the Presidency Small Cause Act, 1882, as amended by Act, of 1895. Order 42 rule 2 of the said rules of Madras which requires at the time of presenting an application for a new trial either the deposit in court of the decree-amount or the giving of security for the due performance of the decree is inconsistent with the statutory rights given by section 38 of the Presidency Small Cause Courts Act, and *ultra vires* for "to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. And the right to apply for a new trial is not a matter of practice or procedure [*Madurai Pillai v. T. Muthu Chetty*, 38 Mad. 823 F. B.]

Rule 49 of the Civil Rules of Practice (Madras) requires the production of a printed copy of the judgment appealed against along with the memorandum of appeal when the judgment contains more than 700 words, but having regard to section 652, Civil Procedure Code, 1882, that rule being inconsistent with section 541 is *ultra vires* of the High

Court and that under sections 122, 128 of the Civil Procedure Code, 1908, the High Court has power to enact rules inconsistent with the rules in the Code, section 157 has not the effect of validating a rule which was *ultra vires* at the time of its enactment. [*Ramakrisina Pillai v. Muthu Perumal Pillai*, 29 M. L. J. 663 = 31 I. C. 924].

Rule 105 of the appellate side Rules of practice. viz., "The appeal shall be liable to be dismissed for default of prosecution if any of the papers mentioned in this rule have not been printed owing to the appellant's failure to make the necessary deposit therefor," is not *ultra vires* of the High Court [*Parkum Chupothi Ammad v. Ambalathan Kandi*, 729 M. L. J. 784].

When a criminal appeal is admitted by the High Court, the whole appeal becomes admitted and a restrictive order for admission on a particular ground such as severity of sentence is outside the scope of sections 421 and 422 Criminal Procedure Code and is *ultra vires* [*Najar Sheikh v. Emp.*, 41 Cal. 406].

When a Judge in the exercise of the ordinary original jurisdiction of the High Court at Madras directed a warrant to issue against the person of a judgment-debtor *to be executed wherever he may be found in the Presidency of Madras*, the order was held to be without jurisdiction. [*Rajah of Ramnad v. Seetharam Chetty*, 26 Mad. 120].

A district Judge has no jurisdiction to make an order under section 5 of Regulation V of 1799, if no regular suit has been brought by the persons claiming the property with which he has dealt. [*Balia Koer v. Bandh Ram*, 38 I. C. 512].

LECTURE IV

For the various Corporations recognised in India, see notes to Lecture XII *post*. Besides those there described—

under the Sri Sassoon Jacob David Baronetcy Act (II of 1915), the Sri Jamssetjee Jejeebhoy Baronetcy Act (X of 1915) the Sir Currimbhoy Ebrahim Baronetcy Act (IV of 1913) trustees have been incorporated for the administration of the estates of the persons concerned therein.

LECTURE VII

In many Provinces, the law relating to Municipalities has been reenacted. In Madras, see City Municipal Act (IV of 1919), Dist. Municipalities Act (V of 1920), in United Provinces, see Act II of 1916, in the Punjab, Act III of 1911.

In *Srinivasa v. Rathnasabapathi* [16 Mad. 474] the council of a municipality, under Madras Act IV of 1884, entered into a contract for the lighting of the town whereby it was provided that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract. One holding a decree against the contractor attached the amount of the deposit in the hands of the municipal council, but the council subsequently passed a resolution in July 1888 declaring that the amount of the deposit had been forfeited. The decree-holder having purchased from the contractor his right to the money in question now sued in 1890 to recover it from the municipality: It was held that the provision for forfeiture in the contract was penal and unenforceable and consequently that the resolution of July 1888 was *ultra vires*.

In *Gowardhandas Goculda Tejpal v. The Municipal Commissioners*, 17 Bom. 394, under section 158 of the City of Bombay Municipal Act, (Bombay Act III of 1888) the following general conditions were prescribed by the Standing Committee with reference to claims for drawback of the general property tax leviable in Bombay :—

(1) "Except with the special sanction of the Commissioner, no claim for draw-back shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half year to which such claim relates.

(2) Drawback of the one fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others —

- (a) Chawls or buildings let out for hire in single rooms either as loading or godowns for the storage of goods.
- (b) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold."

The Commissioner having refused to sanction a drawback of the tax leviable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions, the plaintiff filed the suit. It was contended in his behalf that the second and third of the above conditions were bad, and that the Standing Committee could not by so-called general conditions limit or curtail the right given to tax-payers by section 158. It was held that the conditions prescribed by the Standing Committee were not *ultra vires* and that the Commissioner was justified in refusing the drawback.

In *Emperor v. Nadirsha H. E. Sukhia*, [29 Bom. 35], the accused was convicted and fined Rs. 25 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 231 of Bombay Act III of 1888. The notice required him to make an open drain in the gully on the west of his premises, this drain to be so constructed as to adjoin the west wall of his building. It was held (reversing the conviction and sentence) that the notice was *ultra vires* inasmuch as it required the accused to construct a drain, adjoining a particular part of his premises.

In *Emperor v. Nagindas Chhabildas*, [42 Bom. 454] where accused rented a shop in a public street and projected there from a shopboard into the street without having obtained permission of the Municipality and without paying the fees prescribed in that behalf by the Municipality in its by-law 10, on prosecution for offences under sections 113 and 122 of the Bombay District Municipalities Act, 1901, the contention that by-law 10 was *ultra vires* was not accepted.

In *Godhra Municipality v. Hira Lal*, [51 I. C. 262], a person was charged with building a house without permission, while a permission granted 3 years before was limited only for six months. Heaton, J., said that the Municipality had power to say that a work to which it gave permission under section 96 of the Bombay District Municipalities Act (III of 1901) should be begun within a certain time, but doubted if "the Municipality has power to say that a work must be finished within a given time." Haywad, J., said that a time-limit was not contemplated by the Legislature in enacting that section and that such a limit contained

in a permission to build was *ultra vires*. [See also *Q. E. v. Thakordas* Rat. Unrep. C1. Cas. 684].

The provisions of S. 15 of the Calcutta Municipal Act do not apply to the appointment of Municipal Officers and Servants whose appointments are expressly provided for by Chapter VI of the Act. Under S. 65 of the Act, the Chairman may appoint officers and servants on a salary below Rs. 200 a month, but such appointment is subject to an annual sanction by the General Committee: any appointment made outside the terms authorised by the section is *ultra vires* [*Dedar Nath Bhandary v. The Corporation of Calcutta*, 34 Cal. 863].

Rule 1 of the Rules framed by the Gaya Municipality under the powers vested in them by section 241(d) of the Bengal Municipal Act (III of 1884) is not *ultra vires* or unreasonable. Section 241(d) indicates the time or foundation upon which a Municipality should frame their rules. If they exceed their jurisdiction and the limitation imposed upon them by the section, then these rules will be *ultra vires*. An order therefore made by the Municipality to a house-owner to leave an open space between the external wall of his house and the drain adjoining the road is not illegal [*Chairman, Gaya Municipality v. Sukan singh*, 37 I. C. 854].

Under Section 116(1) (j) of the Berar Municipal Law, 1886, a committee is empowered to make rules for certain purposes and generally for carrying out the purposes of the municipal law, but it does not, even by implication, authorise a committee to make a bye-law depriving the public of a right long enjoyed by it. A bye-law made by the Camp Municipal Committee of Amroati under Sections 79 and 116 of the said Act, prohibiting within the limits of that Committee, a particular class of traffic on certain specified roads, the effect of the bye-law being to deprive the public of a right, in respect of the prohibited traffic which it had long enjoyed, the bye-law was illegal and *ultra vires*, a conviction for a breach of its terms could not be maintained. The mere fact of the Local Government having signified its approval to a bye-law would not render the bye-law valid, in the absence of clear and unmistakeable language in the Act empowering a Committee to make such a bye-law. [*Mahamed Sarwar v. Secretary, Camp Municipality, Amroati* 57 I. C. 341].

By one of the bye-laws of the Delhi Municipality framed under section 188 of the Punjab Municipal Act, "occupiers" of stables used for more than six animals were required to obtain a license from the committee, and the word "occupier" was defined as meaning "the person who is responsible for the letting or sub-letting of the premises to the person in charge of animals, and may include the owner." The Municipal Act itself in paragraph (10) of section 3, however, defined "occupier" as including an owner in actual occupation of his land or building, etc. The petitioner was owner of stables which had been leased to one R M and in which more than six animals were stabled without a license. The petitioner was fined Rs. 10 for a breach of the bye-laws. It was held, that the definition of "occupier" as given in the bye-laws cannot be enforced so far as it is inconsistent with that given in the Act itself. The bye-law making the owner responsible in a case where he is not in actual occupation and has no power to control the acts of his tenant with regard to the use of the premises leased is manifestly unjust to the owner and hence unreasonable, and the English Law as to the necessity of bye-laws being reasonable is applicable to bye-laws framed in the exercise of their statutory powers by Municipal Boards in India [*Joti Pershad v. Crown*, 2 Lah. 239 = 64 I. C. 129, following *Narayan Chandra v. Corporation of Calcutta*, 4 I. C. 259].

The jurisdiction of the civil courts is not ousted when the question is, whether a particular tax purporting to have been imposed under the Berar Municipal Law has any legal existence. When the levy and assessment of any tax by the committee, purporting to be done under the authority of the Berar Municipal law, is alleged to be *ultra vires* the civil courts have jurisdiction to entertain the suit. Where the committee acted *ultra vires* and charged income not liable to tax, the civil court has jurisdiction to entertain the suit and to direct the refund of the amount realised in excess. It is not competent to a Municipality in Berar to assess to tax professional income derived by the assessee outside the municipal limits, when such income is not brought into or mixed up with the income arising within the municipality [*Municipal Committee Malkapore v. Amrit Waman Dayal*, 65 I. C. 532].

An assessment of tax made under Section 85 of Bengal Municipal Act (III of 1884) is final only when that assessment is based upon the

circumstances and the property of the assessee within the municipality. Where the assessment is not in conformity with the statutory provisions and is *ultra vires*, section 110 of that Act does not operate as a bar to the reopening of the question of the amount of assessment in a civil court, merely because the assessee applied under section 113 to the commissioners to review the amount of assessment, and the application was heard by them under section 114, and was disallowed. In an action for the recovery of tax, the assessee can urge that the assessment of tax was *ultra vires* [*Chairman, Raypur Municipality v. Narendranath* 50 I. C. 594. See also *Debnarain v. Chairman, Baraipur Municipality*, 39 Cal. 141, *Manessur Dass v. Collector and Municipal Comr. of Chapra*, 1 Cal. 409; *Chairman of Giridih Municipality v. Srish Chandra Mazumdar* 35 Cal. 859, *Kameshwar v. Chairman, Bhabua Municipality*, 27 Cal. 849].

The accused was convicted and sentenced for the offence of storing and selling grain wholesale within the Cannanore municipal limits without the license of the Municipal Chairman under Ss. 249 and 338 (b) of the Madras District Municipalities Act (V of 1920) contrary to a notification issued in July 1920 by the Municipal Council constituted under the repealed Act of 1884 purporting to act under S. 249 of the new District Municipalities Act (V of 1920), some two months before the new Act was put in force. On revision it was held that the notification was not a valid one under the new Act because the Council purported to act before the new Act came into force and the notification was therefore invalid and consequently the accused was not guilty of the offences under the new Act. The fact that the petitioner was in no way prejudiced is immaterial when the question arose in connection with the application of a penal provision as a strict construction of the law is required in such a case. The notification cannot be supported as a "rule," "bye-law" or "regulation" under the proviso to S. 365 of the new Act, as the conditions requisite for that purpose are not satisfied [*In re Sesha Prabhu*, 42 M. L. J. 149 = 66 I. C. 429].

The defendants, a municipal corporation, agreed to insure certain named properties with the plaintiffs, an insurance company, under a contract which by its terms might have lasted ten years. Before the expiration of this period the defendants refused to pay any further premiums, and in an action by the plaintiffs to recover them the

defendants pleaded that the agreement was so unreasonable as to be *ultra vires* and that it was an implied term that the plaintiff company should be actuarially sound. It was held, that the contract was not *ultra vires* on the score of time, as there was no obligation on the defendants to insure new property with the plaintiffs, and that the defendants had failed to discharge the onus of showing any improvidence on their part, of any financial instability in the plaintiffs, and therefore the plaintiffs were entitled to recover [*Municipal Mutual Insurance Ltd v. Pontefract Corporation*, 116 L. T. 671.]

LECTURE VIII

The various Acts of the different provinces relating to Local Boards have been re-enacted. See Madras Act XIV of 1920; U. P. Act III of 1906; Assam Act I of 1915; C. P. Act IV of 1920, Burma Act IV of 1921.

In *The President of the Taluk Board, Kundapur v. Burde Lakshminarayana Kamphthi* [31 Mad. 54.] an agreement between a contractor and a Local Board contained the following terms:—"As I have taken over under contract for Rs. 406 the right to collect the fees on the articles brought for sale in Udipi market from 1st April 1902 to 31st March 1903, I am bound to act according to the following conditions:—

If I, my agent, or servant were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of the Taluk Board or I am not entitled to object if my gutta is put up for auction again subject to the loss that may be sustained by the Taluk Board.

Under the terms of the above contract, the President of the Taluk Board imposed on the defendant a fine of Rs. 20 on 4th November 1902 in respect of illegal excessive collections made by his agent. The defendant not having paid the fine, the President instituted a civil suit for the amount of the fine on 4th January 1904. It was held that the penal clauses of sections 162 C and 162-D of the Local Boards Act did not preclude the plaintiff from suing the defendant on his contract.

In April 1911, the Local Government Board, in pursuance of their statutory powers, issued a general order to all local authorities whereby

they sanctioned beforehand "any reasonable expenses" that might be incurred by any local authority in connection with any local public celebration on the occasion of the King's coronation; and on May 2nd the defendant council passed a resolution that a sum not exceeding three farthings in the pound should be expended out of the rates in carrying out the coronation festivities in the district. The three farthings rate would produce about £240. The Attorney-General, at the relation of certain rate-payers, brought an action against the local authority to restrain them from paying the £240 out of the rates on the ground that such payment would be *ultra vires* and illegal, and applied for an interim injunction pending the trial of the action. It was held that it was not a case for an interlocutory injunction. *Attorney-General v. East Barnet Valley Urban District Council*, 75 J. P. 484; *Attorney-General v. Morthyr Tydril Union*, (1000) 1 Ch. 516 applied.

Section 23 of the Public Health Acts Amendment Act, 1907, provides that "the making of any addition to an existing building by raising any part of the roof, by altering a wall or making any projection from the building, but so far as regards the addition only . . . shall be deemed to be the erection of a new building." A bye-law of a rural district council required that "every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building . . ." The governors of a school within the area of the district council proposed to add to one of the masters' houses a projection, three storeys high, containing a room on each floor. By virtue of section 23 aforesaid this addition was to be deemed a "new building" within the Public Health Acts and the bye-laws made in pursuance thereof by the rural district council. The council refused to approve plans for the work on the ground that the addition did not comply with the above bye-law as to the provision of an open space in the rear of the new buildings. The school governors contended that it was impossible to provide an open space in the rear of a new building which consisted of an addition to an existing building, and that the bye-law was unreasonable and *ultra vires*. — It was held, that the bye-law was unreasonable and bad. [*Repton School Governors v. Repton Rural Council*, 87 L. J. (K. B.) 897 (1918) 2 K. B. 133]

The owners of frontages on certain roads agreed with the urban authority, by deed made in 1879, that from January 1st, 1880, the roads

should be dedicated to the public, and should be accepted by the urban authority as public highways repairable by the inhabitants at large; and should be maintained and repaired accordingly, and that the urban authority should be at liberty to plant trees and to erect and maintain seats for public use thereon, and to do all other acts, and to exercise all other powers under a Local Act of 1855, and the Public Health Act, 1875. It was, however, in and by the said deed further agreed that the urban authority was to retain and have the same powers of requiring the frontagers, so soon and to such extent only as their lands should be actually occupied for building purposes, to sewer, level, pave, etc., such of the said roads as should for the time being not be sewered, levelled, paved, etc., to the satisfaction of the urban authority and such powers of executing and of recovering expenses, and of taking proceedings in relation to the matters aforesaid, as the urban authority would for the time being have or be capable of exercising under the Public Health Act, 1875 or the Local Act, if the said roads had for the time being, not been accepted by the urban authority as public highways, and were not highways repairable by the inhabitants at large. The corporation, who had adopted the Private Street Works Act, 1892, sued a successor in title of one of the frontagers on one of the said roads, under secs. 14 of that Act, for the apportioned expenses of private street works executed on the road. The frontagers had taken no objection to the provisional or to the final apportionment under secs. 7 and 12 of the Act. It was held that if the meaning of the deed was that the roads were, as between the parties, to be deemed highways repairable by the inhabitants at large, and that—by implication—the corporation undertook not to put into force the Private Street Works Act, 1892, against the frontagers, it was *ultra vires*. If the deed had no such meaning, it was no bar in the present case, to proceedings under sec. 14 of that Act.

Folkestone Corporation v. Rook, 71 J. P. 550]

LECTURE IX.

Boards of Revenue have been reconstituted in Bengal and Bihar and Orissa, by the Bengal Act III of 1913 and Bihar and Orissa Act I of 1913.

It is not within the competence of the Board of Revenue to cancel or revoke a certificate issued by a Collector under the Pensions Act (XXIII

of 1871). Rules issued by the Government and printed at page 125 of the Board's Standing Orders cannot be considered as rules framed under section 14 of that Act.

Sadasiva Aiyar, J., said. "Those rules do not refer to section 14, and they do not state that they were framed by the Board of Revenue with the consent of the Government. Of course, there is a presumption that all official acts have been done in accordance with the law, and if those rules declare that they were framed by the Board of Revenue under section 14, we might presume that the consent of Government had also been obtained for the rules so framed. Or, if section 14 says that, after the Government has given its consent to the rules framed by the Chief Controlling Revenue Authority, that is, the Board of Revenue, they should be issued by the Government, then if the Government issues some rules, we might presume that they were framed by the Board of Revenue with the consent of the Government and issued according to the statute. But when section 14 is silent as to the issuing of any rule by the Government, the mere recitation in the Board's Standing Orders that certain rules have been issued by the Government cannot raise a presumption that they were framed by the Board of Revenue with the consent of the Government. I am, therefore, inclined to hold that these rules are, *ultra vires* and the Collector's certificate is valid without the sanction of the Government." [*Subbarow v. Ramarow*, 18 I. C. 353]

Under the Standing Order XV, cl. 16 of the Madras Board of Revenue, a Deputy Collector is empowered to cancel the grant, if at any time within three years of the date thereof, he is "satisfied that the decision was passed under a mistake of fact." When therefore the Tahsildar makes a grant under the mistaken impression that the plaintiff's *darkhast* is only for a portion of the survey field, while in fact it is for the whole, the Deputy Collector's order cancelling the grant is *ultra vires*. [*Devaramani Bhogappa v. Pedda Bhimaka*, 28 I. C. 51].

Under sections 65 and 66 of the Land Revenue Code (Bom. Act V of 1879) an occupant of land *appropriated for purposes of agriculture* can under certain circumstances be summarily evicted by the Collector. When therefore the land was not used for agricultural purposes, the sections have no application, the order and notice of ejectment are *ultra vires* of the Revenue authorities, because "it is not possible to attribute

the order or the notice to any section of the Land Revenue Code under which the Revenue authorities can be said to have the power to evict the present plaintiffs from the land in dispute" [*Rasulkhan v. Secretary of State*, 39 Bom. 495].

LECTURE VI.

The Indian Companies Act, 1882, was replaced by Act VII of 1913. This Act was amended by Acts X and XI of 1914, XI of 1915, XLII of 1920 and replaced in part by Act XLVII of 1920.

The Indian Life Assurance Companies Act (VI of 1912) regulates the life Assurance Companies and applies to all persons or bodies of persons who carry on life assurance business in British India.

The Provident Insurance Societies Act (V of 1912) provides for the regulation of Provident Insurance Societies. A Provident Insurance Society means any person or body of persons whether corporate or unincorporated which receives premiums or contributions for insuring money to be paid on the birth, marriage or death of any person or on the happening of such other contingency or class of contingencies as may be prescribed. Every society has power to make rules for the disbursement of expenses of management, for payment, of debts and for any other matters that may be prescribed.

The Basel Mission Trading Company Act (XXXV of 1910) constituted the trustees appointed in pursuance of the Enemy Trading Act, 1916, into a Body Corporate under the corporate name of the Mission Trust of Madras.

The Enemy Missions Act (IX of 1921) constituted trustees as bodies corporate for the management of various mission institutions mentioned in the Schedule to that Act.

According to the memorandum of association, plaintiff and another, their heirs, executors and administrators were to be secretaries of a Bank, whose duties, powers and emoluments were set out in the articles of association. Plaintiff continued to be the secretary for many years. Later on at a general meeting, the shareholders appointed a new managing agent to whom most of the powers of the plaintiff were transferred, modified the articles of association, and curtailed the powers and

emoluments of the secretary. Plaintiff then sued the directors of the Bank, and prayed for an injunction restraining them from interfering with the performance of his duties as secretary, contending that the resolution of the share-holders was invalid, since it altered the memorandum of association, and also amounted to a breach of contract by the company with regard to the terms on which he took up the secretaryship. It was held (i) that the resolution of the share holders did not alter the memorandum of association and was therefore valid; (ii) that the portion of the articles which sets out the powers of the secretary is not a part of the memorandum and is therefore liable to be altered by a special resolution under Sec. 76, and (iii) that the resolution was a valid one, there being no proof of any agreement between the secretary and the company to the effect that the subsequent alteration of the articles should not affect the terms of the contract upon which the plaintiff took up the secretaryship [*N. P. N. M. Chidambaram Chettiyar v. Krishna Aiyangar*, 33 Mad. 36].

Where the articles of association of a United Company laid down --- "No person shall be appointed, or have authority to act who is not a share holder in the Company," it was held that to construe the articles as requiring the person appointed to be a share holder when the proxy is signed is to put too narrow a construction on the words, if an unqualified person is named in the proxy, the nomination is not an appointment, in any effective sense; his nomination does not become an appointment until he is qualified; in order to act something more is required—he must be qualified not only when he is 'appointed' but also when he acts [*In re Bombay Burma Trading Corporation*, 29 Bom. 126 (P. C.)].

Where the articles of association provided that the number of directors should be not less than three and also that any casual vacancy occurring on the Board might be filled up by the Board and that the continuing Board might act notwithstanding any vacancy in their Board, and, upon a casual vacancy having occurred, the defendant who had shares allotted to him by the two directors, became subsequently a director and confirmed the resolution to himself and joined in a resolution that the shares allotted to him should be paid in full forthwith, he was held liable to pay the shares allotted to him. [*York Tramway Co. v. Willow*, 8 Q. B. D. 685.]

Where under a trust deed, a majority of the debenture stock-holders had power to sanction any modification of the rights of the stock-holders

as against the company, and the majority passed a resolution agreeing to convert their redeemable stock into irredeemable stock, it was held that the resolution was not *ultra vires*, and was binding on the minority. [*In re Joseph Stocks, & Co., Ltd., Willey v Joseph Stocks & Co., Ltd.*, (1913) 2 Ch. 134, n. = 26 T. L. R. 41).

Articles of an association provided (Article 53) that "the company in general meeting may from time to time...increase its capital by the creation of new shares." Article 59 provided that "any new shares from time to time to be created may from time to time be issued with any such guarantee or any such right of preference over any other shares previously issued...or at such a premium, or with such deferred rights, as compared with any shares previously issued or then about to be issued, or subject to any such conditions or provisions, and with any such right, or without any right of voting, and generally on such terms as the company may from time to time by resolution of a general meeting declare." At extraordinary general meetings of the company, the company passed and confirmed certain special resolutions, among them one substituting the words "by resolution of the directors" for the words "in general meeting" in Article 53. Subsequently the directors passed a resolution to increase the company's capital by the creation of 1,25,000 new shares of £1 each. It was held that, even assuming that the resolution of the directors to increase the capital by the creation of new shares was *intra vires*, those shares could not be issued without the sanction of a resolution of a general meeting of the company as required by article 59; that the plaintiff, who was a shareholder of the company and a former director was not precluded from obtaining an injunction restraining the company from issuing the new shares without the sanction of a resolution of a general meeting by the fact that he had been a party to the passing of the resolutions which authorised the increase of capital and had taken shares issued under earlier resolutions [*Mosely v. Koffyfontein Mines, Ltd.*, (1911) 1 Ch. 73].

The directors of a company had under the articles of association power to delegate any of their powers to committees consisting of such member or members of their body as they thought fit. B was one of five directors. The other directors were dissatisfied with the

manner in which B discharged his functions as director. A resolution was passed at a meeting of directors to the effect that a committee should be appointed to transact all ordinary business of the company and should consist of all the directors except B. It was held that the resolution was invalid, not having been passed in *bona fide* exercise of the powers given to the directors by the articles of association [*Bray Smith, v. Smith*, 124 L. T. Jo. 293.] Where a dissentient minority of share-holders in a company seek redress against the action of the majority of their associates, they must, in order to succeed, show that the action of the majority is *ultra vires*, or that the majority have abused their powers and are depriving the minority of their rights [*Dominion Cotton Mills Co., Ltd v. Amyot*, (1912) A. C. 546 80 L. J. P. C. 233.]

The liquidator of a Bank sued one M for recovery of a certain sum of money on the basis of a promissory note alleged to have been executed by him and one S jointly. It was alleged that M and S applied for the allotment of certain shares in the Bank, which shares were allotted by the managing director on the 29th June 1911 and notice of the allotment was given to M and received by him on the 5th January 1912. On the 18th January M repudiated the allotment and denied having made any application. It appeared that on 20th November 1908 two directors of the Bank had made a delegation of the power of allotting shares to the general manager, and that subsequently, on the 27th November 1908 these two (one representing a third director by proxy) together with a third, purported to confirm the decision of the previous week. It appeared further that neither of these two directors had paid their allotment money by that date: It was held, (1) that under the circumstances no proper meeting of the directors could be said to have been held and that there was no valid delegation of the power of allotting shares; (2) that, consequently there was no valid allotment of the shares to the defendant and therefore, there was no consideration for the promissory note; (3) that in any case, it was open to the defendant to revoke his application for the allotment of any shares, provided the revocation was anterior to the date of any valid allotment or ratification by the Board of Directors; (4) that no valid ratification of the invalid allotment before revocation could be said to have been proved; (5) that, under the

circumstances, the defendant was not liable. [*Bank of Peshawar Ltd v Madhoram*, 51 I. C. 812.]

The original capital of a company consisted of preference and ordinary shares, the preference shares having a fixed dividend, but no priority as to capital. The company, having power to convert its paid-up shares into stock, converted its ordinary shares into ordinary stock at face value, but in converting its preference shares into preference stock bearing a lower rate of interest it gave the holders extra bonus stock to maintain their former dividends. The company also made direct issue of fully-paid preference and ordinary stock for cash without going through the formality of first issuing fully paid shares and converting them. The company also made direct issues of partly paid ordinary shares and partly paid ordinary stock for cash. All the holders were placed on the register and received dividends. Many years after these issues were made the company was wound up voluntarily, and after paying all the creditors the liquidator had a balance of surplus assets for distribution among the members.

It was held, (a) that, having regard to the lapse of time, the irregularity in the direct issues of the fully paid preference and ordinary stock must be treated as waived, and the holders were entitled to rank for the full amount of their holding; (b) that the original holders and transferees of preference stock converted from fully paid preference shares could only rank for the amount representing conversion at face value and not for the bonus stock, which was wholly *ultra vires* and must be treated as non-existent; (c) that the holders of partly paid shares were entitled to rank for the amount paid and were subject to a call for equalisation; (d) that the original holders and transferees of partly paid ordinary stock were not entitled to rank at all, as their stock was wholly *ultra vires* and must be treated as non-existent. [*In re Home and Foreign Investment and Agency Co.* (1912) 1 Ch. 72].

The appellant company issued 5,000 bonds of £10 each, repayable by instalments, on the terms that the company would, when and so far as there were net profits available for the purpose pay to each registered holder the principal money and £25 by way of bonus. It was declared on the face of each bond that the principal and bonus should be payable exclusively out of net profits. The holder of any ten bonds had the option of converting the principal money into a first mortgage debenture of the

company for £100. without prejudice to his right to the bonus. It was also provided that the company might after six calendar months' notice pay off the principal money and bonus. The option of conversion into first mortgage debentures was largely exercised by the bond holders, but £125,000 in respect of bonus remained unpaid, the company not having made any profits. The company proposed to extinguish this liability in respect of the bonus by the issue of fully paid shares. It was held that the proposed transaction was *ultra vires* because it was an issue of shares without payment, inasmuch as the consideration for the shares was the release of a charge upon money which did not belong to the company as a corporation, but to the shareholders as individuals. [*Pamatina Development Corporation, Ltd. and others v. Bury*, (1910) A. C. 430 = 79 L. J. (Ch), 597].

A surrender of shares to a limited company, not involving any reduction of capital and not amounting to a purchase of its own shares by the company, is not necessarily *ultra vires*.

In 1896, pursuant to articles of association and special resolution, the holders of 6 per cent. fully paid preference shares surrendered the same to the company in exchange for fully paid 5 per cent preference shares and a contract in writing was duly filed with the Registrar of Joint-Stock Companies, pursuant to section 25 of the Companies Act, 1867. The surrendered shares were not cancelled, but were subject to be re-issued by the company. It was held that the surrender not involving any reduction of capital was valid; that the transaction did not amount to a purchase by the company of its own shares; and that the new shares issued in exchange were fully paid up. [*Rowell v. John Rowell & Sons, Ltd.*, (1912), 2 Ch. 609; 81 L. J. (Ch), 759. *Teasdale's Case*, (1873) L. R. 8 Ch. 54 and *Eichbaum v. City of Chicago Grain Elevators*, (1891) 3 Ch. 459 followed].

Acts *bona fide* done by a director or manager of a company are valid notwithstanding any defect that may afterwards be discovered in his qualification, and this not only between the company and outsiders, but also between the company and its members.

A chairman who presides over a meeting of a company is neither wholly a ministerial officer nor wholly a judicial officer; his duties are of a "mixed nature" and he is not liable to be mulcted in damages, if

acting *bona fide* according to the best of his judgment and without malice, he erroneously excludes a share-holder from voting and also declares him to be ineligible as a director of the company.

A share-holder, who has been wrongfully refused the right of voting or of election as a director, cannot maintain an action for damages against the chairman of the company without alleging and proving that the latter was actuated by malice in ruling against him. In such cases, the mere deprivation of a man's legal right does not entitle him to damages.

Whether a certain person was or was not a qualified director, whether or not a certain person was qualified to act as chairman of a general meeting, and whether certain persons were or were not duly elected as directors of a company, are matters which relate exclusively to the internal management of a company's affairs. With such matters the court declines to deal at the instance of any person other than the company itself, unless there be something illegal, oppressive, fraudulent, *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they were not fit persons to determine it. People ought as far as possible to be allowed to manage their own affairs without interference by a court of law. [*Ramnarain v. Ramkishan*, 46 P. R. 1911 = 10 I. C. 515].

The director of a company who acts *ultra vires*, but honestly and reasonably, and on the advice of counsel which is erroneous, is within the terms of section 279 of the Companies (Consolidation) Act, 1908, and the court may, if it comes to the conclusion that he ought fairly to be excused for the breach of trust, relieve him from liability either wholly or in part. [*In re Claridge's Patent Asphalt Co.*, (1921), 1 Ch. 543; *In re Allsop Whittaker v. Bamford*, (1914) 1 Ch. 1 applied].

Although a director of a public company is always clothed with a fiduciary character in regard to the dealings of any property of the company in his capacity of director, the rule that a trustee is not allowed to make a profit of his trust does not apply to such a director *qua* director only. [*In re Port Canning Land Investment & Co.*, 6 B. L. R. 278].

A director of a company, though he may occupy a fiduciary position with regard to the share-holders collectively, holds no such position with regard to the individual share-holders. So an action will not lie to recover

damages in relation to certain shares in a company, on the ground that the defendant, a director of the company, knowing the shares to be worthless, made false representations as to their nature and thus induced the plaintiff to purchase the same. [*Wilson v. Macanliffe*, 18 All. 56].

Misrepresentation, by the director of a Bank to an intending applicant for purchase of shares will not bind the Bank, or enable the purchaser afterwards to repudiate the contract with the Bank. [*Provincial Bank of India v. Rai Raja Tej Singh*, 127 P. R. 1889].

When the plaintiff Bank sued the defendant company for recovery of a certain sum due in respect of money advanced by the Bank to the company, for future interest and for a lien on all the raw materials and manufactured goods of the company until satisfaction, and it was contended on behalf of the defendant that the borrowing by the directors from the Bank was in excess of their powers, it was held that the borrowing by the directors in so far as it was in excess of their powers was impliedly ratified and sanctioned by the share-holders at general meetings. The passing of accounts and declaration of dividends constituted sanction and ratification of the borrowing in excess. [106 P. L. R. 1902].

The directors are personally responsible for any loss the company may sustain by reason of acts done by them, not warranted by the memorandum of association [*Kathiawar Trading Co. v. Virchand*, 18 Bom. 119], and the company does not incur any liability in respect of such acts. [*In re Port Canning Land Investment & Co.*, 7 B. L. R. 583].

By the articles of association of the defendant company the Board of Directors were empowered to "appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration . . . and with such powers and authorities, and for such period as they deem fit, and may revoke such appointment." In 1908 the directors appointed the plaintiff as a managing director and agreed that he should hold the office as long as he should remain a director of the company and retain his due qualification and should efficiently perform the duties of the office. The plaintiff continued to comply with those requirements, but in 1912 his appointment as managing director was revoked. In respect of this termination of his agreement the plaintiff claimed damages for wrongful dismissal and the jury found a verdict in his favour. It was held

that the agreement for the appointment of the plaintiff as managing director, although containing no power to revoke the appointment, was *intra vires* the directors, and that the plaintiff was, therefore, entitled to recover damages in respect of his wrongful dismissal. [*Nelson v. James Nelson & Sons, Ltd.*, (1913) (2 K. B. 471 = 82 L. J.) K. B. 827. *Bluett v. Stutchburys, Ltd.*, (1908) 24 T. L. R. 469 distinguished].

A share-holder in a limited company, carrying on the business of timber merchants, brought an action of declarator and interdict against the company, in which he averred that the balance sheet issued by the directors and passed by a general meeting was false and *ultra vires*, in respect that the stock of timber was entered therein at less than its true market value, whereby a part of the profits earned by the company was concealed from the share-holders, but he made no averment of fraud on the part of the directors. It was held that the valuation of the stock of timber was an administrative matter within the discretion of the directors in connection with which they were answerable only to the general body of share-holders of the company; that there were no relevant averments of *ultra vires* acting on the part of the company or the directors; and the action was dismissed. [*Young v. Braconlee & Co.*, (1911) S. C. 677].

When the appointment of a *Mustaddi* by the managing agent of a company was never submitted to the meeting of the share-holders of the company, the mere fact that the person appointed was allowed to work as *mustaddi* for some time could not be held to be ratification or acquiescence in, such appointment by the company. [*Ramchand v. Diamond Jubilee Flour Mills Co., Ltd.*, 10 P. R. 1905].

Section 61, Indian Companies Act (VI of 1882) (corresponding with section 38 of the English Companies' Act of 1862) creates a new liability in the share-holders, and that liability includes contribution, not only in respect of calls made since the winding up, but also in respect of unpaid calls made before the date of the winding up, whether barred by limitation at that date or not. Directors have no power to cancel shares duly issued to a share-holder at his request and so reduce the capital of the company. [*Sorabji Ramselji v. Ishwardas Jugjivandas Store and another*, 20 Bom. 654]. There is nothing to prevent the directors of a company from entering into a contract with company for

their own benefit [10 P. R. 1905]. Once the rights of parties dealing with a registered company have become fixed by a contract, the company cannot by a special resolution subsequently passed by it alter those rights. [*Conjeeveram Hodgsonpet Nidhi v. Kandaswamy*, 28 I. C. 847, following *Allen v. Gold Reefs of West Africa, Ltd.*, (1900) 1 Ch. D. 653].

By an agreement made between the defendant company and the plaintiff, the latter was appointed sole manager for a term of the company's confectionery department and of extensions of it. He was to have full power to conduct in a reasonable manner the practical and commercial business of the department without in any way being interfered with by the directors, except as regarded the expenditure of additional capital on new branches, the erection of additional buildings or machinery, or the conduct of legal matters. The plaintiff now sought to restrain the company from alleged wrongful and unwarrantable interference with the conduct of the business of his department. It was held that the agreement was *ultra vires* of the articles of association of the company and of the directors, and could not be enforced. [*Horn v. Henry Faulder & Co., Ltd.*, 99 L. T. 524]. So when the promoters of a company for working mines contract that the company when formed, shall purchase certain mineral property, without taking precautions to ascertain the value of such property and stipulate that the vendor shall give them a bonus out of the purchase money, the contract is in excess of powers or in breach of trust and cannot be specifically enforced. Where an agreement entered into by the managing agents of a company is unreasonable and such as should not be entertained in the usual way and according to the ordinary course of business it is *ultra vires* and the company is entitled to repudiate it. [*Ramchand v. Diamond Jubilee Flour Mills Co., Ltd.*, 10 P. R. 1905].

A harbour improvement company were authorised by their private Act to establish a fish market. All fish (with some immaterial exceptions) which was landed at the port had, under a penalty, to be sold in the market. The company had power, under section 49 of their Act, to make bye-laws for "the regulations and government of the fish market and of the quay on which the same is established," and penalties were imposed on persons offending against any bye-law. One of the bye-laws made provided that "no person shall gut or cleanse any fish in the market except

by the leave of the wharf-master and in such place (if any) as may from time to time be appointed by the wharf-master for that purpose." An order was made by the wharf-master that, "owing to the impossibility of getting rid of the offal, no dog-fish, ray or skate are to be gutted in the Fish Market." No adequate place for gutting dog-fish was to be found in the town, except the Fish Market. The fish were bought in the market mainly for sending away by rail, and dog-fish must be gutted as soon, after they are landed, as possible, as they largely consist of offal, and quickly decompose. A buyer of dog-fish, the respondent gutted them in the market without obtaining leave from the wharf-master. An information against him was dismissed on the ground that the bye-law was unreasonable, and therefore bad, as it would be impracticable to carry on the industry if buyers were prohibited from gutting fish in the market. It was held, that as the effect of the bye-law was to prevent the landing of the dog-fish, or the sale of it in the Fish Market, it must be sold according to the Act, without the leave of the wharf-master, the bye-law was unreasonable and bad in law [*Sutton Harbour Improvement Co. v. Foster*, 89 L. J. (K. B.) 829].

A company incorporated by private Act of Parliament owned a fish market, where all fish landed in the district for sale had to be sold. Under their statutory powers of making bye-laws for the regulation of the market and preventing nuisances therein the company passed a bye-law prohibiting the gutting of dog-fish in the market. Dog-fish contain an unusual amount of offal, and have to be gutted very soon after landing; and the company had found great difficulty in getting rid of the offal, which was a nuisance. The prohibition would have the effect of altering the conditions of the dog-fish industry, and of restricting the sale of the fish, but would not put an end to it. It was held that the bye-law, in the circumstances, was reasonable, and therefore valid. [*Sutton Harbour Improvement Co. v. Foster* (No. 2) 89 L. J. (Ch.) 540: 123 L. T. 549].

LECTURE XI.

By the IMPERIAL BANK OF INDIA ACT (XLVII of 1920) the Presidency Banks were dissolved and amalgamated into the Imperial Bank of India, of which the Presidency Banks were designated branches. The Imperial Bank is constituted a body corporate, with power to

hold, acquire and dispose of property, open and close branches and enter into contracts. The business is managed by a Central Board of Governors, with Local Boards in all branch stations, which have power to make bye-laws. The schedules specify the nature of business which the Bank can and cannot transact. The annexures to the Act prescribe the procedure and routine of business.

Under the INDIAN RAILWAY BOARD ACT (IV of 1905), a railway board was constituted for controlling the administration of railways in India and may be invested with all or any of the powers exercisable by the Governor-General in Council under the Indian Railways Act, 1890.

The following Acts of Parliament apply to railway companies in India :—

- I.—*G. I. P. Ry. Co.*—21 & 22 Vic. c. 138; 23 & 24 Vic. c. 49; 37 & 38 Vic. c. 102.
- II.—*S. I. Ry. Co.*—21 & 22 Vic. c. 138; 37 & 38 Vic. c. 112; 51 & 52 Vic. c. 5; 53 & 54 Vic. c. 6.
- III.—*Madras Ry. Co.*—16 & 17 Vic. c. 46; 17 & 18 Vic. c. 29; 18 & 19 Vic. c. 40.
- IV.—*B. & B. & C. I. Ry. Co.*—18 & 19 Vic. c. 113; 22 & 23 Vic. c. 101, 61 & 62 Vic. c. 49.
- V.—*E. I. Ry. Co.*—12 & 13 Vic. c. 93, 16 & 17 Vic. c. 226; 18 & 19 Vic. c. 38; 19 & 20 Vic. c. 122; 27 & 28 Vic. c. 157; 42 & 43 Vic. c. 43; 42 & 43 Vic. c. 206; 43 Vic. c. 10; 44 & 45 Vic. c. 53; 48 & 49 Vic. c. 25; 55 & 56 Vic. c. 10, 58 & 59 Vic. c. 20;
- VI.—*E. B. Ry. Co.*—21 & 22 Vic. c. 137; 23 & 24 Vic. c. 44, 63 & 64 Vic. c. 138; 1 Edw. VII c. 25.
- VII.—*O. & R. Ry. Co.*—21 & 22 Vic. c. 81, 51 & 52 Vic. c. 5.

The directors of a railway company have no power at their own hand to dismantle the whole undertaking and convert the plant into money. The directors of a railway company having proposed to dismantle the line and to sell the plant, objection was taken by, inter-alia, one of the shareholders (who was also a

debenture-holder) on the ground that the proposal was *ultra vires* and illegal. It was held that the directors had no power to dismantle the line, and interdict granted as craved. [*Ellice and others v. Invergarry and Fort Augustus Ry. Co.*, (1913) S. C. 849: sub nom. *Lochaber District Committee of Inverness-shire County Council v. Invergarry and Fort Augustus Ry. Co.*, 50 S. C. L. R. 550]

Section 1 of the Great Northern and Manchester, Sheffield, and Lincolnshire Railway Companies Act, 1858, does not authorise the making by the two companies of an agreement for pooling all their income and receipts, nor an agreement for joint-working of both the lines as distinct from a working of both the lines by one only of the two companies. Therefore an agreement intended to effect these objects is *ultra vires* [*In re Great Northern Ry. Co. and the Great Central Ry. Co.*, 24 T. L. R. 417].

A railway company agreed to supply a hotel with a good and adequate supply of water fit for drinking purposes as far as was practicable from the springs in their tunnel. The water was liable to be contaminated, and the plaintiff brought his action insisting that he was entitled to a proper supply of drinking water. It was held that the railway company had carried out their contract, which was simply to supply surface water, which would otherwise run to waste, and that an agreement to supply drinking water, and lay pipes and mains for all time would be *ultra vires*. [*Wilson v. Great Western Ry. Co.* 128 L. T. Jo. 340].

The G. I. P. Ry. Co., while constructing a branch railway known as the Harbour Branch Railway, laid their lines across a public street, which was vested in the Municipal Corporation of Bombay without their permission and without acquiring the road. The municipal corporation sued the railway company to obtain a declaration that the defendant company were not entitled to take possession of the public street, where they had laid their permanent lines of railway without having previously obtained the permission of the corporation and without having acquired the land under the Land Acquisition Act. It was held, on appeal, that under this section (Sec. 7 of the Railways Act) the Railway Company was entitled to lay the line without the permission of the plaintiffs and that there was no necessity to acquire the road, which was already passing across the street. [*G. I. P. Ry. Co. v. Municipal Corporation of Bombay*, 38 Bom. 565].

In a suit by the Municipal Corporation of Bombay against the G. I. P. Ry. Co. to declare that the plaintiffs were entitled to enter upon the lands of the defendant company to make connections between the mains and to lay pipes for this purpose without their permission, it was held that the plaintiff had the right to enter on such lands for the said purpose, that the connections were not either further accommodation works or accommodation works at all and that this section (Sec. 12) does not in any way take away the right of the municipality to enter upon the lands of the defendant company to make the proposed connections. [*G. I. P. Ry. Co. v. Municipal Corporation of Bombay*, 23 Bom. 358].

In a suit against a railway company for the recovery of six pies paid by a person under protest for the purchase of a platform ticket to enable him to enter on the railway platform to see his friend off by a mail train, the Small Cause Court which tried the case decreed for the plaintiff. On the application of the defendant company to the Chief Court to revise the order of the Small Cause Court, it was held (1) that the railway company were justified in excluding from the station platform the respondent without a platform ticket, (2) that a railway administration, under one of the rules framed by the Government of India (rule 29) for the guidance of railway officials and the public, has the right to exclude from the railway station any person not having business on the railway premises; and (3) that the desire of a person to see his friend off would not constitute business within the term of the rule. [*E. I. Ry. Co. v. Lala Moti Sagar*, 116 P. L. R. 1911].

In a suit against a railway company for refund of wharfage alleged to have been illegally levied by the defendant company for delay in taking delivery of the first portion of a consignment, which arrived at the destination in parts on different dates, it was held that the plaintiff's contention that the wharfage charge was illegal must succeed inasmuch as the rules relied on by the company were not published in the *Gazette of India*. It was held also, that the general rules made by the Governor-General in Council, and published in the *Gazette of India* by notification do not become operative as the rules of any individual railway company merely upon their adoption by the company. It must be shown that the particular railway company made rules and that those rules received the sanction of the Governor-General in Council and have been published in the

manner prescribed by the Act. [*Hari Lal Sinha v. B. N. Ry. Co.*, 15 C. W. N. 195].

The plaintiff did not remove from the railway premises goods delivered on payment of freight and other charges legally payable and the delay was due to a dispute between the parties, the plaintiff insisting on the weightment of goods and the defendant company objecting to it. The plaintiff brought a suit against the defendant company for refund of wharfage charges alleged to have been illegally realized from him on the ground that the rules on which the defendant company relied were not made and published in the manner prescribed by Sec. 47 of the Act. It was held, that the rules were not made as contemplated by the Act and a decree was passed in favour of the plaintiff. It was held that rules adopted by a railway company though not originally prepared by it would satisfy the requirement of Sec. 47 of the Railway Act, if they were subsequently sanctioned by the Governor-General in Council and published in the *Gazette of India*. [*B.-N. Ry. Co. v. Ramprotab Gansham Doss*, 16 C. W. N. 360].

The plaintiff purchased a season ticket entitling him to travel on the defendant company's line of railway between two specified stations from the 1st May to the 31st July 1902; on or about the 18th May 1902 he lost the season ticket and requested the defendant company to issue to him a duplicate season ticket which the defendant company declined to do on the ground that the rules contained in their Quarterly Time Table and Railway Guide did not admit of duplicate season tickets being issued and they also declined to make any refund or to return the deposit made on the issue of the season ticket. The plaintiff filed a suit against the defendant company to recover the sum of Rs. 15 being the amount paid for the season ticket, including the deposit, and in the alternative, the plaintiff sought to recover that sum as damages. It was held (1) that the rule of the railway company published in their Quarterly Time Table and Railway Guide as required by Sec. 47 (1) was not *ultra vires* for want of sanction of the Governor-General in Council; (2) that under this rule the company were not bound to issue a duplicate season ticket or to refund the deposit amount [*Byramjee Ratanjee v. B. B. & C. I. Ry. Co.*, Civil Application No. 161 of 1903 in the High Court of Judicature at Bombay].

The plaintiff handed over goods to a railway company for despatch to another place, which was accordingly done. He, however, failed to take a receipt for the goods despatched which never reached their destination and in a suit for damages, the company pleaded that under a rule framed under Sec. 47(1) (1) "delivery" will be deemed to be complete only on a receipt in the proper form being granted by the company's authorised servants, and that as the rule had not been complied with in the case, they were not liable. It was held, overruling this plea, that goods had been 'delivered' to the railway authority within the meaning of Sec. 72 and the company could not escape liability for their negligence.

Per Piggott, J.—It is not open to a railway company to enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the railway, nevertheless the court shall not deem them to have been so delivered unless and until the railway servant in question has performed a particular act, such as granting a receipt.

Per Walsh, J.—No rule which any company can make can cut down, control or limit its liability which is a creature of Statute under S. 72; and if a rule is relied upon by the company which is inconsistent with that liability, it has clearly gone beyond the authority created for making rules. [*Firm Sohanpal Munna Lal v. The East India Railway*. 44 All. 218].

A firm of fire-brick manufacturers, who owned a private railway siding in their works, made use of the locomotives, wagons, and servants of the railway company, when moving materials from one part of the works to another. The Railway Company having intimated an increase in its charges for these services, the manufacturers objected to the increase as unreasonable, but continued to accept the services and to make payments at the old rates, which the company accepted as payments on account. In an action by the railway company for a sum representing the difference between the accounts rendered and the amounts paid, the defendants maintained that the jurisdiction of the court was excluded in respect that the questions of the legality of the increased charges fell to be determined either by an arbitrator appointed by the Board of Trade in terms of the Railway Rates and Charges, [No. 19 (Caledonian Railway, &c.), Order Confirmation Act, 1892, Schedule of maximum Rates and Charges (5)]; or, alternatively, by the Railway and Canal Commissioners in terms

of the Railway and Canal Traffic Act, 1894, S. 1, sub-sec. 3. It was held that the statutory provisions founded upon were inapplicable in respect that the services were not incidental to the conveyance of goods on the railway, but were connected solely with the internal traffic of the brick-works; and accordingly that the jurisdiction of the court was not excluded; also that the services were not *ultra vires* of the railway company, and (2) that the defendants having continued to accept the services after intimation of the increase in the charges, could not object to the increase. [*Caledonian Railway v. Stein & Co.* (1919) S. C. 324]

LECTURE XII.

Port Trusts.—Under the CHITTAGONG PORT COMMISSIONERS ACT (IV of 1887), the management of the office of the Port of Chittagong was vested in a body corporate called the Commissioners of the Port of Chittagong, partly elected by certain commercial bodies and partly nominated by the Local Government. The commissioners may hold property, may construct and carry out certain specified works, may frame a scale of tolls and charges, may make contracts within certain limitations, may raise loans on debentures and may make rules consistent with the Act for carrying out the purposes of the Act.

In an action by Harbour Commissioners against a coal exporter, who brought coals by rail to the harbour for shipment, asking for a declaration that they were entitled to charge rates on all coal shipped as bunker coal or otherwise, and for payment of arrears of rates, the Defendant averred that the commissioners had not charged the export rates in the case of other traders, and in particular had not levied export rates on any sea-borne bunker coal supplied to fishing vessels by certain named traders. He pleaded that this practice amounted to an illegal and undue preference at common law, and that consequently the imposition of such rates on him was illegal and *ultra vires*. The commissioners admitted in evidence that, when rates had already been charged on sea-borne coal, they had not hitherto made a second charge on its re-shipment as bunker coal, taking the view that it was exempted in virtue of a provision in their schedule of rates exempting from further charges goods which had paid rates on importation, where "such goods shall be re-shipped in the original

packages and shall not have changed ownership." They explained, however, that the trade was of recent growth; that they had made no special arrangement with traders and had granted no discharges for rates; and that, even if they were bound to charge rates on the re-shipment of sea-borne coal, the shippers had made it impossible for them to exact the rates by refusing to furnish accounts of their shipments of all bunker coal, both sea-borne and rail-borne. It was held, that no case of undue preference had been proved, and that coal re-shipped as bunker coal did not fall within the exemption founded on by the commissioners. [*Fraserburgh Harbour Commissioners v. Will*, (1916) S. C. 107].

Universities.—Since the passing of the Indian Universities Act, 1904, several universities have been constituted or re-constituted in different parts of India; Benares Hindu University (1); the Patna University (2); the Dacca University (3); the Delhi University (4); the Lucknow University (5); the Rangoon University (6); the Aligarh University (7); the Allahabad University (8); the Calcutta University (9); the Madras University (10).

- (1) Act XVI of 1915, Act III of 1922.
- (2) Act XVI of 1917.
- (3) Act XVIII of 1920.
- (4) Act VIII of 1922.
- (5) U. P. Act II of 1920.
- (6) Burma Act IX of 1920.
- (7) Act XL of 1920.
- (8) U. P. Act III of 1921.
- (9) Act VII of 1921.
- (10) Act VII of 1923.

Under these Acts, the powers of the University have been enlarged, and the constitution made more representative. The limits of the powers of the University and its governing bodies are defined in the respective Acts and so long as such powers are exercised within such limits and in the manner prescribed all acts so done will be valid.

In the matter of G. A. Natesan [40 Mad. 125] the powers of the Senate and the Syndicate of the Madras University under the Madras University Act of 1857 and Indian University Act of 1904 were discussed. In granting an application for an order under section 45 of the Specific

Relief Act by a fellow of the Madras University against the Syndicate for the purpose of compelling the Syndicate to forward to the Government a protest of his under Regulation 64 of the University Regulations against a resolution of the Senate, it was held that a regulation of the Senate providing for protests to Government in respect of all its resolutions will be *ultra vires* in respect of those which do not under the Act require the sanction of the Government.

Rule 5 of the regulations for the conduct of examinations framed by the University of the Punjab, provides that any candidate detected in giving or receiving assistance or in the use of any other unfair means in connection with an examination shall be disqualified from passing it and also from appearing at any University examination for a period of two years from the date of his disqualification and this rule was not *ultra vires* [*Tajumad v. the University of the Punjab, Lahore*, 2 Lah. 197].

In *re Abdul Rasul* [41 Cal 518] it was held that the question whether the sanction required under Sec. 12, Ch XI of the Calcutta University Regulations for the appointment of a University lecturer was *ultra vires* or not could not be determined in summary proceedings.

THE CO-OPERATIVE SOCIETIES ACT (II of 1912) was passed to facilitate the formation of Co-operative Societies for the protection of thrift and self-help among agriculturists, artisans and persons of limited means. Under it any society which has as its object the promotion of economic interests of its members in accordance with co-operative principles or a society established with the object of facilitating the operations of which a society may be registered with or without limited liability. These societies are declared bodies corporate with power to hold property, enter into contracts and the like with perpetual succession and a common seal. The society cannot advance a loan to any person other than a member and cannot take deposits from persons other than members beyond what is prescribed by the rules or bye-laws. It may invest its fund in certain specified securities. No part of the funds may be divided by way of bonus or dividend or otherwise, except out of reserve fund and a contribution may be made with the sanction of the Registrar, to any purpose coming under the Charitable Endowment Act, 1890. The provisions of the Indian Companies Act do not apply to these societies.

Provident Society —The rules of a Provident Society provided that all disputes arising between a member and the society should be settled

by arbitration. An action having been commenced by a member of the society for a declaration (a) that resolutions passed by the committee of the society purporting to permit certain members to withdraw from their membership or to give up shares, and authorising payments consequent thereon, and (b) further resolutions authorising the conveyance of land belonging to the society* to certain members in consideration of the cancelling of their shares were *ultra vires* and void, the defendants applied that all proceedings in the action might be stayed on the ground that the matters in difference between the parties were disputes within the meaning of section 49 of the Industrial and Provident Societies Act, 1893. It was held that the disputes came within the purview of that section, and that the proceedings must be stayed [*Cox v. Hutchinson*, (1910), 1 Ch. 513; 79 L. J. (Ch.) 259; *Stone v. Liverpool Marine Society*, 63 L. J. (Q. B.) 471 applied].

Friendly Society.—The transfer by a Friendly Society of £50,000 out of its actuarial surplus to the fund for providing pensions on retirement for those engaged in the active service of the society was held not to be *ultra vires* of the society. [*Kirsopp v. Helghton*, 28 T. L. R. 493].

By the rules of a registered Friendly Society it was provided that meetings for the "management of the society" should consist of "delegates" elected by the members. It was held that a resolution for the conversion of the society into a limited company, in terms of sect. 71 of the Friendly Societies Act, 1896, passed by a general meeting of "delegates," was *ultra vires*, in respect that under that Act a resolution for conversion could only be carried by a certain majority of the members of the society at a general meeting of members and that that requirement was not affected by the rule of the society providing that meetings should consist of "delegates"; accordingly, that a scheme for the conversion of a Friendly Society into a company, the memorandum of association of which permitted (a) the distribution of surplus assets among members, who under the rules of the society would have had no right to participate in that surplus and (b) payments to employees of sums out of capital which were unauthorised by the society's rules, was *ultra vires*. [*Willkinson v. City of Glasgow Friendly Society*, (1911), S. C. 476].

By section 77 of the Friendly Societies Act, 1896, the Chief Registrar may on proof that a society exists for an illegal purpose cancel the registry of the society. It was held that the mere fact that a society exists for the purpose of doing acts which are *ultra vires* its rules does not make it a society which exists for an illegal purpose within the meaning of the section, that the illegal purpose must be one which is unlawful independently of the rules; and that, for the purpose of determining the question whether a society exists for an illegal purpose, the time at which the illegality of the purpose is to be considered is the time at which the cancelling order is proposed to be made. [*Re Middle Age Pension Friendly Society*, (1915) 1 K. B. 432. See also *Performing Right Society v. London Theatre of Varieties, Ltd.*, (1922) 2 K. B. 433].

Trade Unions.—Trade Unions must be classed under Friendly Societies. They are generally registered under the Societies Registration Act (XXI of 1860) in India

The general trustees of a society established as a trade union under the Trade Union Acts, 1871, and 1876, acting in pursuance of a resolution of the General Council, subscribed £100 of the moneys of the society for shares in a limited company which had been formed with the object of publishing a newspaper in the interests of the Labour Party, and whose profits, after payment of 4 per cent. on its shares, were to be used in the maintenance and extension of its business. The object of the resolution of the General Council was not simply to invest the moneys of the society, but to contribute to the expenses of publishing the newspaper. The shares were applied for and allotted before the passing of the Trade Union Act, 1913. There was nothing in the rules of the society which authorised the application of its funds for political purposes. It was held that the above application of the funds of the society was unauthorised and *ultra vires*, and not the less so because of the provisions of the Trade Union Act, 1913, as that Act gave the society no further powers with reference to political objects than those contained in the rules of the society, and that, therefore, the trustees were liable to make good the £100 with interest. [*Bennett v. National Amalgamated Society of Operative House and Ship Painters and Decorators*, (1915) W. N. 73: 113 L. T. 808].

A trade union was established in order "to obtain for its members the best possible conditions of labour in connection with the trade."

and the establishment of a fund for the relief of its members in sickness, with medical and surgical aid, assistance to members out of employment, accidents, old age, for the internment of deceased members and their wives, and for regulating the relations between employers and employees, and to attain these objects or some of them by assisting in securing legislation for the purposes of its trade subject to the Trade Union Act, 1913. The rules further provided that the executive council were to exercise full control over the funds of the society and administer the same in strict accordance with the rules, that the funds of the society were to be invested in the Post Office Savings Bank unless otherwise sanctioned by the executive council and by rule 39 "the executive council and branches may propose places in which to invest the reserve fund; the same shall be submitted to the members to decide by vote. Except in any corporate body under public control, all above £4 per member to be invested so that it can be obtained at any time by three months' notice." It was held that the application of the society's money in the purchase of shares in a company, the principal object of which was to promote the policy of the Labour Party by the publication of a news paper, was not within any of the objects of the society as defined by its rules nor an ordinary investment of the society's funds within the rules, but was simply a contribution towards the expenses of publishing a political newspaper and, therefore was *ultra vires*; and that the moneys having been misapplied, the members of the executive council were personally liable to make them good to the society. [*Carter v. United Society of Boilermakers and Iron and Steel Shipbuilders*, (1913) W. N. 334: 32 T. L. R. 40].

M, a member of a trade union, at meetings of the union, made various attacks on its officers, accusing them of misconduct in connection with the affairs of the trade union. It was afterwards resolved that the union, the general secretary, the committee, and lodges should take proceedings in respect of these attacks on behalf of the union or in their own names. The trade union did not take any such proceedings, but the general secretary sued M for slander and obtained a verdict. M was unable to pay the damages or the costs, and the trade union paid out of its funds the costs incurred by the general secretary to his solicitor. There was no rule of the trade union authorising such a payment. In an action by a member for a

declaration that such payment was *ultra vires*, and for repayment by the general secretary of the amount, it was held that the trade union had no legal interest in the result of the slander action, that the payment to the general secretary of the amount of his solicitor's costs was *ultra vires*, and that the general secretary was liable to repay it to the trade union with interest at 4 per cent. [*Oram v. Hutt*, (1912) W. N. 284].

The executive council of a trade union invested a part of their funds in a company formed to publish a newspaper to promote the interests of a political party, it was held, that the transaction was not an investment, but a contribution, from which, in the events which happened, no pecuniary return was forthcoming, towards the expenses of publishing a newspaper of definite political views, and that this application of the funds, not being within any of the objects of the trade union as defined by its rules, was *ultra vires*, and that the members of the executive council were personally liable to repay the amount of the subscription to the funds of the union. [*Charter v. United Society of Boilermakers*, 85 L. J. (Ch.) 289 : 113 L. T. 1152 ; *Bennett v. National Amalgamated Society of Operative House and Ship Painters and Decorators*, 85 L. J. (Ch.) 298n. : 113 L. T. 808].

Employers posted a lock-out notice suspending all employees who were members of a certain union, with the exception of a foreman. The union having intimated to its members that the notice must apply to all without exception, a member, who was a foreman, thereupon gave notice to his employers that he would leave their employment in a fortnight in conformity with a rule of the union that such notice must be given by members before leaving situations. During the fortnight he remained at work. Thereafter he was expelled from the union on the ground that he had remained at work during the lock-out, but he was ultimately reinstated subject to a fine of £1, and the loss of all benefit to which he was entitled in respect of his former membership. In an action at his instance for a declaration that the resolution expelling him was *ultra vires* and null and void, and for an interdict to prevent the union enforcing the resolution, it was held, that the action could not be entertained, it being excluded by section 4(1) of the Trade Union Act, 1871, as it was a proceeding instituted with the object of directly enforcing an agreement between members of a trade union concerning the conditions on which they should be employed, and that the action was also excluded by

section 4 (3) (a), as being a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members. [*Smith v. Scottish Typographical Association*, (1919) S. C. 43].

A branch committee of a trade union had power under their rules to expel any member for conduct bringing the union into discredit. A member of the branch wrote to the head office alleging irregularities on the part of the branch committee. On being required to attend a meeting of the committee, he maintained that he did not intend to cast any reflection on the committee, and offered to write to the head office to that effect. He failed to keep his promise, and ultimately a resolution was passed expelling him from the union. The plaintiff claimed a declaration that the resolution was *ultra vires* and void. It was held that the action of the committee was amply justified under the circumstances, and that the action must be dismissed with costs. [*Wolstenhulme v. Amalgamated Musicians' Union*, 89 L. J. (Ch.) 388 : (1920) 2 Ch. 388].

Corporations for public purposes—The following corporations have been created by the Indian Legislature for specific purposes of public utility.

Under THE TOWN IMPROVEMENTS ACTS such as the City of Bombay Improvement Act (Bom. Act IV of 1898) and the Calcutta Improvement Act (Bengal Act V of 1911) Boards of Trustees have been constituted for the improvement and expansion of those cities as bodies corporate. The Boards are charged with the carrying out of the objects of the Act, are invested with power of borrowing, acquiring, and disposing of property, and making bye-laws enforceable with penalties.

A Calcutta landlord was tried by the President of the Tribunal appointed under the Calcutta Improvement Act (Beng. Act V of 1911) for cutting off water connection in a tenanted house and was fined. On a rule to set aside the order, it was held that the provisions of section 20 of the Calcutta Rent Act (Beng. Act IV of 1920) were not *ultra vires*, but rule (4) of the rules framed under section 23 of that Act were *ultra vires* [*Goberdone Das v. Doolichand*, 48 Cal. 955].

Under THE MADRAS TOWN PLANNING ACT provision is made for the constitution of 'Board of Trustees' as body corporate to carry out the purposes of the Act. See Madras Act VII of 1920.

Under THE INDIAN MUSEUM ACT (V of 1910) a Board of Trustees has been constituted as a body corporate with property vested in them and with power to manage the museum and to make bye-laws, to exchange, sell, destroy, &c. articles and collections. Similar provision is made for the Prince of Wales Museum in Bombay by the Prince of Wales Museum Act (see Bom. Act III of 1909, as amended by Bom. Act VI of 1921).

THE INDIAN RED CROSS CAPITAL SOCIETY ACT (XV of 1920) constituted the Indian Red Cross Society to provide for the future administration of various monies and gifts received from the public for the purpose of medical aid to the sick and wounded and other purposes of a like nature during the late war. The members of the society are constituted a body corporate with a managing body with powers to make rules for the management, control and procedure of the society. The scope of these rules is defined and the purposes to which the funds may be applied are specified.

Under THE MEDICAL ACTS of various provinces Medical Councils have been constituted for the regulations of medical practice :—(See Burma Act I of 1915, Bom. Act II of 1916; B. & O. Act II of 1916; Bom. Act VI of 1912; C. P. Act I of 1916; Punjab Act II of 1916; U. P. Act III of 1917; Madras Act IV of 1914.

THE CALCUTTA BURIAL BOARD'S ACT (Beng. Act V of 1881) was passed for the general management, regulation and control of the burial grounds in the Town of Calcutta and its Suburbs. By that Act a Burial Board was constituted, with powers to receive and expend fees and grants, to appoint and remove overseers, clerks and servants and to make rules for carrying out the purposes of the Act.

Under Bengal Act IV of 1889, a Muhammadan Burial Board was constituted with powers similar to those mentioned in Bengal Act V of 1881.

Under THE VILLAGE PANCHAYATS ACTS panchayats have been constituted for providing for the requirements of small areas in respect of water supply, sanitation and other works of public utility. See Bom. Act IX of 1920 and Mad. Act XV of 1920.

Under THE ELEMENTARY EDUCATION ACTS, educational councils have been constituted as bodies corporate with the power to carry out the

purposes of the Acts. See Madras Act VIII of 1920; Bom. Primary Education Act I of 1918.

Under Statutes 7 and 8, Geo. V. c. 51 an air council has been constituted for the administration of matter relating to the air force and to the defence of the realm by air, and this Act applies to India.

Corporation sole.—Among corporations sole, real or *quasi*, must be classed, all those officials in charge of a continuing department of Governmental activities. The Official Assignee and the Official Receiver under the Insolvency Act, the committee of a lunatic under the Lunacy Act, the Administrator-General and the Official Trustee are instances in India. Of these the Official Trustee and the Administrator-General have been expressly declared by the Legislature in Act II of 1913 and Act III of 1913 to be corporations sole with perpetual succession and an official seal, with power to sue and be sued in the corporate name and these Acts prescribe the powers conferred on these officers.

Under THE INDIAN DEFENCE FORCE ACT (III of 1917) and the AUXILIARY FORCE ACT (XLIX of 1920) and THE INDIAN TERRITORIAL FORCE ACT (XLVIII of 1920), the Commander-in-Chief has power to make regulations for purposes specified therein.

INDEX.



	A.	PAGE.
ACQUIESCENCE	76
	B.	
BOARD OF REVENUE		
history of	280
origin of	281—82
powers of	284—86, 381
BYE-LAWS		
by Corporations	179
by Local Boards	275
by Municipalities	253—59
by Presidency Banks	339
	C.	
COMPANIES	237, 74 seq.
classes of	383
joint-stock	288
mode of forming	288
powers of	297
to alter memoranda	292
to alter regulations	309
to appoint inspectors	302
to buy own shares	303
to close register	296
to contract	293
to refer to arbitration	302
winding up of	310
CORPORATIONS		
aggregate	182
at Common Law	186

	PAGE.
CORPORATIONS—<i>contd.</i>	
artificialities of	174
by implication	186
by prescription	186
capacities of	192
classification of	181
continuous identity of	173
creation of	184
definition of	170
foreign	181
funds of	209
history of	19—23
in India	105—7, 373
incidents common to	175—79
objects of	183
powers of	52
majority	190
not bound by governing bodies exceeding powers	199
over members—	187
quorum	190
sole	182
D.	
DEWANNY grant of	279
DIRECTORS	
delegation by	309
of banks	338
powers of	396
E.	
EAST INDIA COMPANY	109
ESTOPPEL	203
FORFEITURE	
of rights	71
of shares	308

	F.	PAGE.
FORMALITIES	...	54
directory	...	54, 56, 60, 62
discretionary	...	54
express	...	65
imperative	...	55, 63, 73
imposed legislature	...	66
relating to managing body	...	75
	G.	
GOVERNMENT OF INDIA		
powers of	...	88, 361 <i>et seq.</i>
	H.	
HIGH COURTS		
constitution of	...	168
history of	...	148 <i>et seq.</i>
powers of	...	369
	I.	
ILLEGALITY		
examples of	...	11
what is	...	8
IMPERIAL BANK OF INDIA	...	393
	J.	
JURISDICTION		
definition of	...	7
meaning of	...	5
of High Courts	...	164
	L.	
LOCAL BOARDS		
constitution of	...	265, 379
early history	...	261-264
functions of	...	275
funds of	...	269
property of	...	269

	PAGE
LOCAL BOARDS - <i>contd</i>	
re-establishment of	208
supercession of	207
unions	277
LOCAL GOVERNMENTS	111 <i>et seq.</i>
definition of	123
powers of	125, 361 <i>et seq.</i>
LOCAL LEGISLATURES	114 <i>et seq.</i>
M.	
MORTMAIN, STATUTE OF	11
MUNICIPALITIES	
application of <i>ultra vires</i> to	215
constitution of	218
funds of	226
history of	211, 374
jurisdiction of civil courts	247, 239-44
power to acquire lands	228
to enter into contracts	230
to impose taxes	232
proprietary rights of	222
quasi-judicial powers of	231
relation to courts of law	214
to Government	213
statutory powers of	245
P.	
PORT TRUST	344, 395
PRESIDENCY BANKS	
business of	326, 335
constitution of	325
powers of	
appointments	338
in suits	338
to close transfer books	335

	PAGE.
PRESIDENCY BANKS— <i>contd.</i>	
to contract	332
to declare dividends	337
to increase or reduce Capital	333
to make bye-laws	338
Q.	
QUASI CORPORATIONS	341 <i>et seq.</i>
in England	341
in India	343
R.	
RAILWAY BOARD	394
companies	370 <i>et seq.</i>
power to	
alter pipes	315
change terminals	317
enter into working agreements	321
establish ferries	323
execute works	313
make general rules	318—21
remove obstructions	316
use locomotives	317
RATIFICATION	
express	76
implied	76, 77
indirectory formalities	60
what act, subject of	77
what is	75
S.	
SECRETARY OF STATE	109
SOCIETIES	
co-operative credit	355—401
description of	352

	PAGE.
SOCIETIES— <i>contd.</i>	
friendly	402
statutory	353—55
	T.
TRADE UNIONS	403
	U.
ULTRA VIRES	
acquisition of property and breach of trust ...	41
and illegality	1, 9, 10
and want of jurisdiction	1, 3
burden of proof in	85
doctrine of	12
development of	19, 26, 31
why applied	18
effect of acts	201
examples of acts	11, 195
liability for acts	203
logical consequences of	33
meaning of	12
improper	50
primary	45
proper	45
secondary	46
UNIVERSITIES	345, 400
constitution of	347
powers of	
to confer degrees	348
to make regulations	349
syndicate of	347

